SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 773

JACK ESCOE, PETITIONER,

vs.

FRED G. ZERBST, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fols. a & b] [Caption omitted]

[fol. 1] Citation in usual form showing service on L. E. Wyman, filed April 5, 1934 omitted in printing.

[fol. 2] **IN UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF KANSAS, FIRST DIVISION**

Case No. 336-H. C.

In re JACK ESCOE, Habeas Corpus

PETITION FOR WRIT OF HABEAS CORPUS—Filed Dec. 1, 1933

To the Honorable John C. Pollock, United States District Judge.

Now comes your petitioner and respectfully shows to your Honorable Court, that on October 5, 1932, he appeared before the United States District Court, Eastern Division, of the District of Texas, at Tyler, Texas, to answer an indictment alleged a violation of the National Motor Vehicle Theft Act. A certified copy of said indictment is hereto attached. (Case Number 3490.)

Your petitioner further shows that he entered a plea of guilty to said indictment, and was sentenced by said Court, and said sentence be and the same is hereby suspended for a period of five (5) years on conditions of probation and the defendant be placed in charge of the District Probation Officer for that length of time. A certified copy of the judgment and sentence is hereto attached.

Your petitioner further shows that while he was at liberty under the Suspended Sentence, he was arrested at Marshall, Texas, on an order of the United States District Court, for the Eastern District of Texas, Tyler Division. Your petitioner shows that instead of being taken before said Court at Tyler, Texas, and given a hearing as provided by law, and the Constitution of the United States, he was on August 11, 1933, brought directly from Paris, Texas, by a Deputy United States Marshal, Mr. Crow, and surrendered to the Warden of the United States Penitentiary, at Leavenworth, Kansas, where he has at all time since been imprisoned.

[fol. 3] Your petitioner shows that by reason of the fact that he was not taken before the Court to answer to the charge of violation of his Suspended Sentence, and that by reason of the fact that he was brought directly to the United States Penitentiary, at Leavenworth, Kansas, without such hearing before the Court that sentenced him, he is unlawfully imprisoned and restrained of his liberty.

Your petitioner further shows that he is unable to attach to this petition a copy of the commitment under which he is held in said last named prison for the reason that is informed that under the rules and regulations of the Department of Justice, the Warden of said Penitentiary is not allowed to furnish copies of commitments nor to allow anyone to inspect or make a copy of the commitment of any prisoner in his charge and that your petitioner is unable to state the terms or conditions of said commitment under which he is held, but states and alleges that he is unlawfully and illegally held and confined in said penitentiary by Fred G. Zerbst, as Warden of the United States Penitentiary, at Leavenworth, Kansas.

Your petitioner further shows that he is unable to attach to this petition a copy of the warrant under which he was arrested at Marshall, Texas, or the order addressed to the Deputy United States Marshal, Mr. Crow, directing him to transport your petitioner to the United States Penitentiary, Leavenworth, Kansas. It is the opinion and belief of your petitioner that said warrant and order were delivered to the Warden of the United States Penitentiary at Leavenworth, Kansas, coincident with the delivery of your petitioner.

Wherefore, your petitioner prays that a writ of habeas corpus issue, directed to Fred G. Zerbst, Warden of the United States Penitentiary, at Leavenworth, Kansas, ordering and directing him to produce your petitioner before this Honorable Court at the time to be stated in said writ and praying that upon a hearing that thereon your petitioner may be discharged from further confinement.

Jack Escoe, Petitioner

[fol. 4] *Duly sworn to by Jack Escoe. Jurat omitted in printing.*

EXHIBIT "A"

Case No. 3499. Certified Copy of Indictment. United States District Court, District of Eastern Texas, Tyler Division. United States vs. Jack Escoe.

EXHIBIT "B"

Certified copy of judgment and sentence. United States District Court, District of Eastern Texas, Tyler Division. United States of America, plaintiff, against Jack Escoe, defendant.

AFFIDAVIT IN FORMA PAUPERIS

Jack Escoe, of lawful age being first duly sworn according to law deposes and says:

That he is the same Jack Escoe who signed the foregoing and attached petition for a writ of habeas corpus; and that on account of his poverty he is unable to make a deposit for the costs in said cause; that he has no property of any kind or nature from which he could make such amounts; that on account of his imprisonment and restraint, he is deprived of his earning power and unable to earn any amount from which to pay said costs; affiant further says that he has a meritorious case and that justice be done, this petition for a writ of habeas corpus may be ordered filed by this court, under the forma pauperis, as in such cases made and pro-
[fol. 5] vided. Further affiant saith not.

Jack Escoe, Affiant

Subscribed and sworn to before me this 22 day of Nov. 1933 A. D.

E. C. Eckhold, Notary Public, County of Leavenworth, State of Kansas. (Notarial Seal.) My commission expires April 29, 1935.

Case No. 336 H. C.

In re JACK ESCOE, Habeas Corpus

APPLICATION FOR APPOINTMENT OF ATTORNEY

To the Honorable John C. Pollock, United States District Judge.

Jack Escoe, of lawful age being first duly sworn according to law deposes and says:

That on account of his poverty, he is unable to employ an attorney and respectfully requests the court to appoint him an attorney and represent him in the case entitled: In Re: Jack Escoe, Petition for Writ of Habeas Corpus.

Jack Escoe, Petitioner.

Subscribed and sworn to before me this 22 day of Nov. 1933 A. D.

E. H. Eckholdt, Notary Public. (Notarial Seal.)
My commission expires April 29, 1935.

[fol. 6] INDICTMENT

UNITED STATES OF AMERICA,
Eastern District of Texas, ss:

In the District Court of the United States in and for the Eastern District aforesaid, at the Tyler October Term thereof, A. D. 1933.

The Grand Jurors of the United States, impaneled, sworn and charged at the Term aforesaid, of the Court aforesaid, on their oath present, that one Jack Escoe, alias Jack Adams, alias Jack Thomas, on the 28th day of January, in the year of our Lord nineteen hundred thirty-two in the Tyler Division of said district and within the jurisdiction of said Court, did then and there unlawfully, knowingly, fraudulently and feloniously transport in interstate commerce from New Orleans, in the State of Louisiana, to Marshall, in the State of Texas, within the Tyler Division and aforesaid district and within the jurisdiction of said court, a certain motor vehicle not designed for running on rails, to-wit: one Chevrolet Roadster Motor No. 2129335, then and there of the approximate value of $300.00, and the property of the "U Drive It Car Company", of New Orleans, Louisiana, and which said automobile had theretofore been stolen and taken from the possession of G. E. Fisher as Manager of the said "U Drive It Car Company", a corporation, incorporated under the laws of the State of Mississippi, and without the consent of that corporation and G. E. Fisher, Manager thereof; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

(Signed) J. H. Calhoun, Foreman of the Grand Jury.
(Signed) S. D. Bennett, United States Attorney.

Endorsed: No. 3499. District Court United States, Eastern District of Texas. The United States vs. Jack Escoe, alias Jack Adams, alias Jack Thomas. Indictment. Vio.

National Motor Vehicle Theft Act. A True Bill. (Signed) J. H. Calhoun, Foreman. Filed Oct. 4, A. D. 1932. F. A. King, Clerk, By H. C. Blades, Deputy. S. D. Bennett, U. S. Attorney.

[fol. 7] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

Cr. No. 3499

THE UNITED STATES

vs.

JACK ESCOE, alias JACK ADAMS, alias JACK THOMAS

JUDGMENT

On this, the 5th day of October, A. D. 1932, came the United States Attorney and announced ready for trial and the defendant, Jack Escoe, alias Jack Adams, alias Jack Thomas, appearing in his own proper person announced ready for trial.

Whereupon, the defendant being duly arraigned upon the charge contained in the indictment herein filed against him, plead guilty.

Thereafter, to-wit, on the 10th day of October, A. D. 1932, the defendant again appearing and being asked by the Court if he had anything to say why the judgment and sentence of the Court should not be pronounced upon him, in accordance with his confessed plea of guilty, entered in this cause on the 5th day of October, A. D. 1932, and no good cause being shown why the judgment and sentence should not be pronounced herein;

It is, therefore, considered by the Court and so ordered, adjudged and decreed that the defendant is guilty of violation of the National Motor Vehicle Theft Act, to-wit: of unlawfully, knowingly, fraudulently and feloniously transporting in interstate commerce from New Orleans, in the State of Louisiana, to Marshall, in the State of Texas, a certain motor vehicle, a Chevrolet Roadster, knowing same to have been stolen property as charged in the indictment herein, and his punishment is fixed and assessed as follows:

That the defendant be imprisoned in the United States Penitentiary at Leavenworth, Kansas for a period of four (4) years and six (6) months.

It appearing to the satisfaction of the Court that the ends of Justice and the best interest of the public, as well as that of the defendant, will be subserved by the suspension of the execution of the sentence pronounced herein;
[fol. 8] It is therefore considered by the Court, and so ordered, that said sentence be and the same is hereby suspended for a period of five (5) years on conditions of probation and the defendant be placed in charge of the District Probation Officer for that length of time.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

Cr. No. 3499

THE UNITED STATES

vs.

JACK ESCOE, alias JACK ADAMS, alias JACK THOMAS

ORDER MADE ON AND ATTACHED TO MOTION TO REVOKE SUSPENDED SENTENCE

Ordered that the suspended sentence heretofore granted the defendant be, and the same is hereby in all things revoked, and the clerk will issue a commitment and deliver the same to the United States Marshal for execution.
This August 5, 1933.

(Signed) Randolph Bryant, Judge.

UNITED STATES OF AMERICA,
Eastern District of Texas, ss:

I, F. A. King, Clerk of the United States District Court in and for the Eastern District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original indictment, judgment of conviction and sentence, and order revoking suspended sentence and directing clerk to issue commitment as of August 5, 1933; in the case of United States vs. Jack Escoe, alias Jack Adams, alias [fol. 9] Jack Thomas, Cr. No. 3499, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed by name and affixed the seal of the aforesaid Court at Tyler, Texas, this 17th day of November, A. D. 1933.

F. A. King, Clerk, by Susie Kerr, Deputy Clerk. (Seal.)

Endorsed: Cr. No. 3499. United States District Court, Eastern District of Texas. The United States vs. Jack Escoe, alias Jack Adams, alias Jack Thomas. Certified copy indictment, judgment of conviction and sentence, order revoking suspended sentence.

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed Dec. 18, 1933

Comes now the respondent, Fred G. Zerbst, Warden, and moves the court to dismiss the petition for writ of habeas corpus filed herein for the reason that said petition does not state facts sufficient to give the court power, authority or jurisdiction to grant the writ prayed for.

S. M. Brewster, United States Attorney. L. E. Wyman, Assistant U. S. Attorney.

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

RESPONSE TO PETITION—Filed Jan. 26, 1934

Now comes the respondent, F. G. Zerbst, Warden, by S. M. Brewster, United States Attorney, and L. E. Wyman, Assistant United States Attorney for the District of Kansas, and for response to the petition filed herein alleges:

That the petition on its face with exhibits attached does not state facts sufficient to give this court power, authority or jurisdiction to grant the writ prayed for.

Respondent admits as alleged in the petition that the petitioner entered a plea of guilty on October 5, 1932, in the District Court of the United States for the Eastern District

of Texas, Tyler, Division, to a charge of violating the National Motor Vehicle Theft Act and that there is attached to the petition filed herein a certified copy of the indictment and a certified copy of the journal entry of plea, judgment and sentence pronounced by the court in his case. Respondent further alleges that there is attached to the petition a certified copy of the order of Hon. Randolph Bryant, United States District Judge for the Eastern District of Texas, Tyler Division, which order is dated August 5, 1933, revoking the probation granted as alleged in the petition and ordering the issuance of a commitment for execution to the United States Marshal.

Further answering respondent alleges that on July 27, 1933, Mr. A. Escoe, father of the petitioner, wrote a letter to Hon. Oscar Gresham of Sherman, Texas, said Oscar Gresham being the duly appointed qualified and acting United States Probation Officer for the Eastern District of Texas, a copy of which said letter is attached to this response in place of the original by agreement of counsel, in which said letter facts were brought to the attention of said Probation Officer and that petitioner had violated the conditions of his probation.

Respondent alleges that in answer to said letter of the father of the petitioner, the United States Probation Officer wrote Mr. A. Escoe on July 29, 1933, acknowledging the letter of Mr. A. Escoe of July 27, 1933, and in which [fol. 11] said letter information was imparted to Mr. A. Escoe as to the procedure being taken to revoke the order of Probation heretofore given, a copy of said letter, by agreement of counsel, is attached to this response and made a part thereof.

Respondent further alleges that on July 30, 1933, Mr. A. Escoe, the father of the petitioner, again wrote Hon. Oscar Gresham, the United States Probation Officer, with reference to the petitioner having violated his probation, a copy of which said original letter is attached to this response and made a part thereof by agreement of counsel.

Respondent alleges that on July 31, 1933, the United States Probation Officer wrote Mr. A. Escoe concerning the revocation of the probation granted petitioner, a copy of which said letter is attached to this response and made a part thereof.

Respondent further alleges that there is attached to the response and made a part hereof, marked Exhibit 1, the following documents to-wit:

1. Certified copy of indictment upon which petitioner plead guilty.

2. Certified copy of journal entry of plea, judgment and sentence of petitioner.

3. Certified copy of application filed July 29, 1933, by the United States Probation Officer Oscar S. Gresham in the District Court of the United States for the Eastern District of Texas, Tyler Division. That said application was for the issuance of a capias for the arrest of petitioner for violation of his probation. That there also appears on said application the order of Hon. Randolph Bryant, United States District Judge for the District of Texas, ordering the issuance of capias for the arrest and delivery of the petitioner to the United States Probation Officer aforesaid.

4. Warrant for arrest of petitioner for a violation of probation.

5. Application of probation officer to revoke the probation heretofore granted petitioner and setting out reasons for the revocation of said probation. That there is attached to said application the order of Hon. Randolph Bryant the United States District Judge for said District made August 5, 1933, revoking the probation theretofore granted by him and directing the commitment of the petitioner to the United States penitentiary at Leavenworth, Kansas.

[fol. 12] 7. Commitment and return of Marshal on commitment confining petitioner to the United States Penitentiary at Leavenworth, Kansas.

Respondent alleges that there was no appeal from the order of the court revoking the probation or protest for bring the petitioner before the court.

Respondent alleges that it was not necessary under the Act of June 16, 1933, U. S. C. A. Title 18, Section 725, to bring the petitioner before the court.

Respondent further alleges that petitioner by his actions, in taking no appeal or protesting his commitment to the

United States Penitentiary at Leavenworth, Kansas, has waived any privilege he may have had to appear before the court.

Respondent further alleges that the procedure and discretion of the United States District Court for the Eastern District of Texas in revoking the probation granted herein cannot be raised by a writ of habeas corpus in this court.

Respondent having fully answered prays that the petition for writ of habeas corpus be denied.

S. M. Brewster, United States Attorney. L. E. Wyman, Assistant U. S. Attorney.

(Copy)

Marshall, Texas, July 27, 1933.

Hon. Oscar Gresham, Sherman, Texas.

DEAR MR. GRESHAM:

It is with much sadness that I write you this letter, but duty impells me to do so. Jack has broken his parole; he has been drunk four or five days, and has forged a few checks. I have tried my best to save him, but I have failed.

There is no question in my mind but that Jack has some kind of spells, but after all, he will be better off in confine-[fol. 13] ment than he will be running at large. I trust that when you send him to Leavenworth, you will see that he gets a treatment for whisky. The district attorney told me this afternoon that he would gladly release Jack to you.

There is one request, Mr. Gresham, I want to make of you, and that is this, get Jack out of Marshall just as quick as you can. I ask this to save embarrassment to our family. My wife and I are willing for Jack to go, for we are afraid that sometime when he gets drunk, he will do something desperate. When he is drunk, he has no mind at all.

I feel that Jack's sentence is a long one, but may be something will happen that the sentence can be shortened.

I hope you can come to Marshall tomorrow, but if you cannot, please advise me when you will be here, so I shall be in Marshall, I want to see you.

Thanking you for past favors and praying that God will save our boy from his ways, I am

Yours respectfully, (Signed) A. Escoe.

(Copy)

July 29, 1933.

Re Probation No. 194. Jack Escoe, Tyler Division.

Mr. A. Escoe, 701 East Austin Street, Marshall, Texas.

DEAR MR. ESCOE:

Your letter of July 27th calling my attention to a recent dereliction and infraction of the law and probation conditions by your son, Jack, has just been received.

Mr. Escoe, I cannot tell you how sorry I am that this eventuality has occurred. I am sorry for you and sorry for Mrs. Escoe because of the sorrow and humiliation this dereliction of Jack has brought to you, but I want to congratulate you, Sir, on your steadfastness, sense of fairness and sense of duty as disclosed by your report to me.

Judge Bryant has signed an order for a capias for the arrest of Jack. This will be forwarded to the clerk at Tyler and the capias will be issued and sent to me. After Jack is arrested on this capias, I shall immediately file a motion to revoke his suspended sentence and commit him. There is no other course to pursue.

[fol. 14] I wish you would write me just as soon as you get this letter and tell me whether Jack is in jail and where he can be found when the Marshal comes with the capias. I believe it would be better for him not know that this capias is being issued and particularly if he is not in jail. I shall ask the Marshal to remove him from Marshall just as soon as possible.

Also please write me telling me just exactly what Jack did. If he forged checks, the amount of the checks and the names of the persons whose signatures he forged. It is necessary for me to have this information in filing a motion to revoke. As soon as the capias is served and I hear from you, I shall write you further. I cannot come to Marshall at this time.

Very truly yours, Oscar S. Gresham, U. S. Probation Officer, Sherman, Texas.

(Copy)

Marshall, Texas, July 30, 1933.

Hon. Oscar S. Gresham, Sherman, Texas.

DEAR MR. GRESHAM:

I have received your letter, and shall hasten to reply. I don't know where to begin, but I shall try to tell you what you want to know.

You asked whose names Jack forged to the checks. He forged mine to two checks, one to the Sugar Bowl Cafe for $10, and one to Leonard Johnson for $15. I could have got him by with this, but I felt that it would be very wrong to do that. He has been drinking here for several days. He has never forged any other name to a check but mine. When I had money I paid these checks, but now I have no money. The only reason I ever paid a check for Jack was that I knew he had spells, when he did not know what he was doing. Right here in Marshall I can find twenty leading men who will go in court and swear that there are times when Jack does not know what he is doing. It seems cruel for a man to have to serve a term in prison under such circumstances. However, I made you a promise at Tyler that I would report any violation of his parole to you. I have kept my promise. I wish to say right here that he had a charge of insanity preferred against him in this court two years ago, but before he could be tried, he left Marshall. Had his trial gone to court, he would have been convicted. When I was at Tyler, I wanted to tell Judge Bryant these things, but I did not get a chance to do so. Of course I regret to see the boy go to prison and serve at hard labor for a long term of years for something seemingly he cannot help. I want to further state, however, that Jack should not be permitted to run at large in his present condition. But he needs treatment worse than he needs punishment.

[fol. 15] I have been wondering if there is a place owned by the Federal authorities where men can be treated. If he is not cured, he will spend his life behind the bars. I have been thinking that possibly Judge Bryant has the power to shorten his term at Leavenworth. The first sentence he gave Jack was for eighteen months. Personally I wanted to accept that sentence, however, I wrote Judge Bryant, asking for a suspension of sentence. I

was just afraid that Jack would have a spell and break his parole.

I was talking with Judge P. O. Beard Saturday, and Judge Beard said Jack should be confined but not in a penitentiary. Judge Beard was Jack's first friend, when Jack was in Leavenworth, or rather when Jack got out on parole.

I trust that you understand my attitude. I have all confidence in Judge Bryant. I think he is one of the greatest and best men I ever met in all my life, and whatever Judge Bryant sees fit to do, will meet with my approval.

My wife is signing this letter with me.

Yours respectfully, (Signed) A. Escoe, (Signed) Mrs. A. Escoe.

Mr. Gresham I failed to tell you that Jack is in the Harrison county jail, and will remain there till you send for him. I thought I told you in my first letter that Jack was in jail. Another thing I wish to say is this, Jack thinks that the District Attorney turned him in to you. If it makes no difference to you, just let him keep thinking it. I wish you would let Judge Bryant read my and my wife's letter to you.

(Signed) A. Escoe.

(Copy)

July 31, 1933.

Mr. A. Escoe, 701 East Austin Street, Marshall, Texas.

DEAR MR. ESCOE:

I thank you and Mrs. Escoe for your very courteous letter of July 30, 1933.

I note what you say with respect to my showing the letter to Judge Bryant. It will be three or four days before I can prepare and present to the Judge a motion to revoke the suspended sentence and commit your son to the institution to which he was originally sentenced.

[fol. 16] In the meantime, I wish, if you so desire, that you and Mrs. Escoe would write to Judge Bryant and tell him anything and everything you desire to say concerning the matter of the revocation of your son's suspended sentence and his commitment to Leavenworth. I assure you that anything you may write Judge Bryant will be carefully considered by him and I think it would be much

better for the information you desire to convey to him to go directly to him and not be communicated through me.

I would be glad if you would send me a copy of any communication you send to Judge Bryant.

Very truly yours, Oscar S. Gresham, U. S. Probation Officer, Sherman, Texas.

EXHIBIT 1 TO RESPONSE

Indictment omitted. Printed side page 6 ante.

[fols. 17 & 18] Judgment omitted. Printed side page 7 ante.

[fol. 19] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

No. 3499-Cr.

Probation No. 194

THE UNITED STATES

v.

JACK ESCOE

APPLICATION FOR CAPIAS

To Honorable Randolph Bryant, Judge:

On October 5, 1932, in the United States District Court, for the Eastern District of Texas, Tyler Division, the defendant, Jack Escoe, entered his plea of guilty to a charge of violation the National Motor Vehicle Theft Act. His plea of guilty was accepted by the Court, whereupon the Court imposed upon the defendant a sentence of four and a half years in the United States penitentiary at Leavenworth, Kansas. This sentence, however, was suspended for five years on written probation conditions signed by the defendant and Probation Officer.

The defendant, Jack Escoe, having wilfully and grossly violated the conditions of his probation in this; having,

since he has been on probation, committed a felony under the Statutes of the State of Texas, to-wit: forgery, Probation Officer files this application and asks the Court for an order to issue capias for the arrest of the defendant and deliver the same to Probation Officer to the end that the defendant may be placed in jail, a motion prepared for the revocation of his suspended sentence and commitment to the United States Penitentiary to serve the sentence originally imposed.

This July 29, 1933.

Oscar S. Gresham, United States Probation Officer.

[fol. 20] The foregoing application of Probation Officer having been heard and considered by the Court,

Ordered that the Clerk file this motion and issue a capias for the arrest of said defendant and deliver the same to Oscar S. Gresham, United States Probation Officer.

This July 29, 1933.

Randolph Bryant, Judge.

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF TEXAS

CAPIAS

The President of the United States of America

To the Marshal of the Eastern District of Texas—Greeting:

You are hereby commanded to take Jack Escoe, alias Jack Adams, alias Jack Thomas, late of the County of Smith, if he shall be found in your District, and that you safely keep him, so that you may have his body before the District Court of the United States of America, for the Eastern District of Texas, in the Fifth Circuit, before the Judge of the same Court instanter, to answer unto the United States of America, in a plea of tespass; and also in a certain bill of the United States of America against said defendant for having wilfully violated the conditions of his probation, according to the custom of the said court, before said court, then and there to be exhibited, and have you also then and there this writ.

Witness, the Honorable Randolph Bryant, Judge of said Court, and the seal thereof, at Tyler, Texas, this 31st day of July, in the year of our Lord one thousand nine hundred and thirty-three and of American Independence the 158th year.

F. A. King, Clerk, U. S. District Court, Eastern District of Texas, by Susie Kerr, Deputy.

[fol. 21] MARSHAL'S RETURN

Received this writ on the Third day of August, 1933, and I executed the same on the Fourth day of August, 1933, at Marshall, Texas, by arresting the within-named defendant Jack Escoe and now have his body in my custody.

Phil E. Baer, U. S. Marshal, Eastern District of Texas, by A. B. Faust, Deputy.

Endorsed: D. Cr. No. 3499. United States District Court, Eastern District of Texas. The United States of America vs. Jack Escoe. Capias. Issued July 31, 1933, returnable instanter. F. A. King, Clerk, by Susie Kerr, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

Cr. No. 3499

Probation No. 194

THE UNITED STATES

v.

JACK ESCOE, alias JACK ADAMS, alias JACK THOMAS

REPORT OF PROBATION OFFICER

To the Honorable Randolph Bryant, Judge:

On October 5, 1932, the defendant Jack Escoe, in the United States District Court for the Eastern District of Texas, Tyler Division, the Honorable Randolph Bryant, Judge presiding, entered his plea of guilty to a violation of the National Motor Vehicle Theft Act.

His plea of guilty was accepted by the Court and on October 10, 1932, the following sentence was imposed:

4½ years confinement in the United States Penitentiary, Leavenworth, Kansas. The execution of said sentence, however, was suspended for five years on probation conditions in writing at that time delivered to the defendant by Probation Officer.

Supervision began on October 10, 1932, and the defendant from that day until the violation of Probation Condi-
[fol. 22] tions hereinafter named, continued to report to Probation Officer that defendant had violated his condi- being signed and approved by his father, Mr. A. Escoe.

On July 29, 1933, it having come to the knowledge of Probation Officer that defendant had violated his conditions of probation as hereinafter shown, application was made to Your Honor for an order directing the clerk to issue capias for the arrest of said Jack Escoe. The application was granted by the court on July 29, 1933, which said application for capias was forwarded to the clerk of the United States District Court for the Eastern District of Texas, Tyler, for issuance of the capias. Capias was issued and returned to Probation Officer. Whereupon, it was forwarded to Honorable Phil E. Baer, United States Marshal, Paris, Texas, for execution and return, with the information that the defendant, Jack Escoe, would be found in the County Jail at Marshall, Texas.

One of the conditions of probation prescribed by the court in this case was: (a) Refrain from the violation of any state or Federal Penal Laws.

Another condition of probation prescribed by the court was: (b) Lead a clean, honest and temperate life.

The defendant, Jack Escoe, has violated the two conditions of probation above set out in this: He forged the name of his father, A. Escoe, to a check for $10.00 and passed the same to the Sugar Bowl Cafe. He likewise forged his father's name to a check for $15.00 and passed the same on one Leonard Johnson, thus committing, under the laws of the State of Texas, two felonious acts.

The defendant, Jack Escoe, for several days prior to the time he committed the felonious acts above stated, had been intoxicated.

Wherefore, Probation Officer files this motion and asks the court for an order revoking the suspended sentence of

the said Jack Escoe and directing the clerk to issue a commitment to the United States Penitentiary at Leavenworth, Kansas, to serve the sentence of four and a half years originally imposed.

[fol. 23] Probation Officer submits to the court herewith a detailed history of the defendant, of his attempted supervision and of his past criminal record.

This August 5, 1933.

Oscar S. Gresham, United States Probation Officer.

The foregoing motion having been heard and considered by the court,

Ordered, That the suspended sentence heretofore on, to-wit: October 10, 1933, be, and the same is hereby in all things revoked. The Clerk will file this motion and order and issue a commitment and deliver the same to the Marshal for execution.

This August 5, 1933.

Randolph Bryant, Judge.

(Endorsed) No. 3499. The United States vs. Jack Escoe, alias Jack Adams, alias Jack Thomas. Report and Motion of Probation Officer and Order of Court thereon. Filed Aug. 7, 1933, F. A. King, Clerk U. S. Court, by J. R. Blades, Dep.

COMMITMENT

Cr. 3499

THE UNITED STATES

vs.

JACK ESCOE

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

The President of the United States of America:

To the Marshal of the United States for the Eastern District of Texas and to the Warden of the United States Penitentiary at Leavenworth, Kansas, Greeting:

Whereas, at the October term of said Court, 1932, held at Tyler in said district and division, to-wit, on October 10,

1932, Jack Escoe was senteneed by said Court, upon his [fol. 24] plea of guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a Penitentiary for and during the term and period of four (4) years and six (6) months for violation of the National Motor Vehicle Theft Act—to-wit, for unlawfully, knowingly, fraudulently and feloniously transporting in interstate commerce from New Orleans, in the State of Louisiana, to Marshall, in the State of Texas, thence to Tyler, in the State of Texas, a certain motor vehicle, a Chevrolet Roadster, knowing same to have been stolen property. Sentence suspended for a period of five (5) years upon condition, among other requirements, of good behavior, and,

Whereas, said suspended sentence has been revoked by order of court of date August 5, 1933, on motion of U. S. Probation Officer, Eastern District of Texas,

And Whereas, the Attorney General of the United States has designated the United States Penitentiary at Leavenworth, Kansas, as the place of confinement where the sentence of said Jack Escoe shall be served;

Now, this is to command you, the said Marshal, forthwith to take said Jack Escoe and him safely transport to said U. S. Penitentiary and him there deliver to said Warden of said Penitentiary with a copy of this writ; and you, the said Warden, to receive said Jack Escoe and him keep and imprison in accordance with said sentence, beginning August 5, 1933, date suspended sentence revoked, or until he shall be otherwise discharged by due course of law.

Witness the Honorable Randolph Bryant, Judge of said Court, and the seal thereof, affixed at Tyler, in said district, this 7th day of August, 1933.

F. A. King, Clerk, by J. R. Blades, Deputy Clerk.
(L. S.)

[fol. 25] Return

I have executed the within writ in the manner following, to-wit: On August 4th, 1933, I delivered said Jack Escoto the Jailer of the Lamar County Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on August 12th, 1933, I delivered said Jack Esco- to the Warden of Leavenworth Penitentiary at

Leavenworth, Kansas, together with a copy of this commitment.

Phil E. Baer, United States Marshal, by Della Ashley, Deputy.

Certified Copy

UNITED STATES OF AMERICA,
Eastern District of Texas, ss:

I, F. A. King, Clerk of the United States District Court in and for the Eastern District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original Indictment, Judgment of Conviction and sentence, Application for Capias and order of Court thereon, Capias, Report and Motion of Probation Officer and Order of Court thereon, and Commitment in the case of The United States vs. Jack Escoe, alias Jack Adams, alias Jack Thomas, Cr. No. 3499, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Tyler, Texas, this 8th day of December, A. D. 1933.

F. A. King, Clerk, by Ruth B. Head, Deputy Clerk.
(Seal.)

[fol. 26] Endorsed: 3499. United States District Court. Eastern District of Texas. The United States vs. Jack Escoe. Certified copy Indictment, Judgment of Conviction and Sentence, Application for Capias & Order thereon, Capias, Report and Motion of Probation Officer & Order thereon, and Commitment.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO DISMISS AND DENYING WRIT—Filed Jan. 26, 1934

Now on this 26th day of January, A. D. 1934, at Topeka, Kansas, came regularly on for hearing the motion of the respondent to dismiss the petition for writ of habeas corpus filed herein. The petitioner appeared by Floyd Strong, his

attorney, and the respondent appeared by L. E. Wyman, Assistant United States Attorney, the Court upon being duly advised in the premises finds and orders that said motion to dismiss should be and the same is hereby overruled to which finding and order the respondent excepts and his exceptions are hereby allowed.

Upon application of the respondent, it is thereupon directed that the respondent file a response to the petition herein forthwith and that the petitioner if he so desires file his reply to said response.

Thereupon the petitioner introduced his evidence including the exhibits attached to his petition and rested, the respondent thereafter introduced his evidence including the exhibits attached to the response and rested.

The court after argument of counsel and after consideration of all of the pleadings filed herein and being duly advised in the premises, finds that said writ for habeas corpus should be and the same is hereby denied, to which finding and order the petitioner excepts and his exceptions are hereby allowed.

Richard J. Hopkins, Judge.

Approved: L. E. Wyman, Attorney for Petitioner.
Floyd D. Strong, Attorney for Respondent.

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed March 27, 1934

In the District Court of the United States

To the United States District Attorney, for the District of Kansas.

Notice is hereby given you that Jack Escoe, the petitioner in the above entitled cause, has this day taken his appeal from the final judgment of the Court dismissing the application for a writ of habeas corpus and refusing to grant the relief prayed for in said petition. Said order granting the dismissal of the petition and refusing the relief therein

prayed for, was made and entered of record on or about the 26th day of January, 1934 A. D.

Jack Escoe, in Propria Persona.

Dated this the 23 day of March 1934 A. D.

Jack Escoe, P. O. Box #7, Leavenworth, Kansas:

Notice acknowledged March 26, 1934.

L. E. Wyman, Asst. U. S. Atty.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed March 27, 1934

Comes now, Jack Escoe in the above entitled cause and respectfully shows to this Honorable Court, that on or about the 26th day of January, A. D., a final judgment was rendered and entered of record sustaining a motion to dismiss the petition for a writ of habeas corpus and refusing to issue the writ of habeas corpus for to all of which action and ruling of the court petitioner was allowed exception.

That in said action and ruling of the court, and the judgment and proceedings error was committed to the harm [fol. 28] and prejudice of petitioner, all of which will appear in detail in the assignment of error hereto attached.

Wherefore, petitioner prays that an appeal be allowed from such action, ruling final judgmgent to the Circuit Court of Appeals for the Tenth Circuit. And:

Your petitioner prays that a transcript of record and proceeding and papers upon which such order was made duly authenticated may be sent to the United States Circuit Court of Appeals for the Tenth Circuit.

Jack Escoe, Petitioner and Appellant.

In United States District Court

Order Allowing Appeal—Filed March 27, 1934

Appeal allowed this 27 day of Mar. 1934, A. D. Appeal Bond $500.00.

Richard J. Hopkins, United States District Judge.

[File endorsement omitted.]

In United States District Court

Assignment of Errors—Filed March 27, 1934

Now comes Jack Escoe, the petitioner and appellant in the above cause and files the following assignment of errors upon which he will rely in his prosecution of an appeal to the United States Circuit Court of Appeal for the Tenth Circuit, from the order of this Court refusing to produce the body and denying and dismissing the petition for a writ of habeas corpus, on or about the 26th day of January, A. D. 1934, and refusing to grant relief prayed for therein, to-wit:

First

The District Court erred in refusing to produce the body [fol. 29] of the petitioner as provided therefor under the provisions of section 458, Title 28, of the United States Criminal Code.

Secondly

The District Court erred in to the harm and prejudice of the petitioner in denying the relief prayed for in the petition for a writ of habeas corpus, and in granting the motion dismissing the petition.

Thirdly

That the District erred in ruling that probation or suspended sentence could be revoked without opportunity for a hearing being given as provided for under Section 725, Title 18, of the United States Criminal Code and the Constitution of the United States.

Fourthly

That the District Court erred in ruling that under Section 725, Title 18, of the United States Criminal Code as amended June 16, 1933, that probation or suspended sentence could be revoked without a hearing.

Fifthly

That the District Court erred in permitting the United States Attorney to introduce, and to be guided by, evidence used by the trial court in revoking appellant's probation or suspended sentence without a hearing, in deciding whether or not your petitioner was unlawfully restrained of his liberty without due process of law in violation of his guarantees under the Constitution of the United States.

Wherefore, the petitioner and appellant respectfully prays that said order denying the production of his body in Court; and the order of dismissal and final judgment may be reversed and that the said Jack Escoe be ordered discharged from his present unlawful imprisonment as prayed for in the petition for a writ of habeas corpus.

Jack Escoe, Petitioner Per Se.

[fol. 30] *Duly sworn to by Jack Escoe. Jurat omitted in printing.*

[File endorsement omitted.]

In United States District Court

Præcipe for Transcript of Record—Filed March 27, 1934

To the United States District Court Clerk for the District of Kansas:

You are hereby requested that under the ruling of the Court, you prepare a transcript of the record in the above entitled cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, under notice of appeal from the above District Court; and to:

(1) Petition—brief for writ of Habeas Corpus.
(2) Response—motion to deny and dismiss petition.
(3) Order of the Court denying writ of Habeas Corpus.

(4) Notice of appeal.
(5) Petition for appeal.
[fol. 31] (6) Order allowing appeal.
(7) Assignment of errors.
(8) Citation and service of same.
(9) Præcipe for transcript.
(10) Motion to file and docket transcript in Forma Pauperis.

Jack Escoe in Propria Persona.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO FILE AND DOCKET TRANSCRIPT AND PROCEED IN FORMA PAUPERIS—Filed March 27, 1934

Comes now, Jack Escoe, the appellant and moves this Honorable Court to grant him leave to file and docket the transcript and proceed to prosecute said appeal in forma pauperis. That he is a citizen of the United States, and a resident of Marshall, Texas. That because of his poverty he is unable to pay the clerk's general fee for filing of the transcript in this Court or give security for said costs and that he is unable to pay cost of printing of the record; that he verily believes he has a meritorious cause of action and entitled to the redress he seeks by said appeal, and that his appeal is taken in good faith.

Jack Escoe, Appellant.

[File endorsement omitted.]

[fol. 32] IN UNITED STATES DISTRICT COURT

STATE OF KANSAS,
County of Leavenworth, *ss:*

AFFIDAVIT IN FORMA PAUPERIS—Filed March 27, 1934

Jack Escoe, being first duly sworn, says that he desires to proceed with the appeal from a decision rendered by the United States District Court of Kansas.

That he is a citizen of the United States, a resident of the City of Marshall, Texas.

That because of his poverty he is unable to pay the Clerk's general costs of filing the transcript or for printing of the record in said cause, or give security for said costs.

That he verily believes that he is entitled to redress he seeks by said appeal is taken in good faith.

Wherefore, appellant and affiant prays that he be granted leave to proceed in forma pauperis as is provided for under the provisions of an act of Congress approved July 20, 1892 as amended June 25, 1910 and June 27, 1922, and he will ever pray.

Jack Escoe, Affiant.

Subscribed and sworn to before me this 23 day of March 1934 A. D.

E. H. Eckholdt, Notary Public, County of Leavenworth, State of Kansas. [Notarial Seal.] My commission expires April 29, 1935.

[File endorsement omitted.]

[fol. 33] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

ORDER GRANTING LEAVE TO PROSECUTE APPEAL IN FORMA PAUPERIS—May 16, 1934

This cause came on to be heard on the motion of appellant for leave to docket the case and to prosecute the appeal herein as a poor person and to have the appeal considered by the court on a typewritten transcript of the record and typewritten copies of brief of appellant, and was submitted to the court.

On consideration whereof, and for good cause shown, it is now here ordered by the court that the said motion be

and the same is hereby granted and that appellant may docket the cause instanter, which is accordingly done, and prosecute the appeal without being required to prepay fees or costs or to give security therefor.

It is further ordered by the court that appellant be and he is hereby granted leave to have the appeal considered upon a certified typewritten transcript of the record and typewritten copies of his brief.

It appearing to the court that the appellant is a poor person and unable to employ counsel, it is further ordered that Floyd D. Strong, Esquire, be and he is hereby designated and assigned as counsel for appellant to prosecute the appeal in this cause.

[fol. 35] In United States Circuit Court of Appeals

Before Honorable Robert E. Lewis, Circuit Judge, Honorable Orie L. Phillips, Circuit Judge, and Honorable Tillman D. Johnson, District Judge.

Order of Submission—Sept. 21, 1934

This cause came on to be heard, Harry C. Green, Esquire, appearing for appellant, no one appearing for appellee.

On motion, appellant was granted leave to file four typewritten copies of a reply brief in this cause instanter, which was accordingly done.

Thereupon this cause was argued by counsel for appellant and was submitted to the court.

[fol. 36] In United States Circuit Court of Appeals, Tenth Circuit, September Term, A. D. 1934

No. 1095

Jack Escoe, Appellant,

vs.

Fred G. Zerbst, Warden, Appellee

Appeal from the District Court of the United States for the District of Kansas, First Division

Before Lewis and Phillips, Circuit Judges, and Johnson, District Judge

Mr. Harry C. Green for appellant.

Mr. S. S. Alexander and Mr. L. E. Wyman submitted brief for appellee.

Opinion—January 7, 1935

Johnson, District Judge, delivered the opinion of the Court:

On the 18th day of December, 1933, Jack Escoe, appellant, filed in the court below his petition praying that a writ of habeas corpus issue directing the appellee Zerbst, warden of the United States penitentiary at Leavenworth, at a time to be stated, to have the petitioner before the court and on [fol. 37] hearing had to discharge him from said penitentiary. On the 26th day of January, 1934, the trial court made the following order:

"Now on this 26th day of January, A. D. 1934, at Topeka, Kansas, came regularly on for hearing the motion of the respondent to dismiss the petition for writ of habeas corpus filed herein. The petitioner appeared by Floyd Strong, his attorney, and the respondent appeared by L. E. Wyman, Assistant United States Attorney, the court upon being duly advised in the premises finds and orders that said motion to dismiss should be and the same is hereby overruled to which finding and order the respondent excepts and his exceptions are hereby allowed.

"Upon application of the respondent, it is thereupon directed that the respondent file a response to the petition

herein forthwith and that the petitioner if he so desires file his reply to said response.

"Thereupon the petitioner introduced his evidence including the exhibits attached to his petition and rested, the respondent thereafter introduced his evidence including the exhibits attached to the response and rested.

"The court after argument of counsel and after consideration of all of the pleadings filed herein and being duly advised in the premises, finds that said writ for habeas corpus should be and the same is hereby denied, to which finding and order the petitioner excepts and his exceptions are hereby allowed."

This order recites that evidence was introduced by the parties respectively. No bill of exceptions is found in the record preserving the same. We are limited, as apparently the trial court limited itself, to a consideration of the pleadings including the exhibits attached.

The applicable statute is that part of the second paragraph of Section 725, Title 18, U. S. C. A., as amended on June 16, 1933, which reads:

"At any time within the probation period the probation officer may arrest the probationer wherever found, without [fol. 38] a warrant, or the court which has granted the probation may issue a warrant for his arrest, which warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued. Thereupon such probationer shall forthwith be taken before the court. * * * Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed."

The allegations of the petition material to the present inquiry are:

"That on October 5, 1932, he appeared before the United States District Court, Eastern Division, of the District of Texas, at Tyler, Texas, to answer an indictment alleged a

violation of the National Motor Vehicle Theft Act. A certified copy of said indictment is hereto attached.

"That he entered a plea of guilty to said indictment, and was sentenced by said court, and said sentence be and the same is hereby suspended for a period of five (5) years on conditions of probation and the defendant be placed in charge of the district probation officer for that length of time. A certified copy of the judgment and sentence is hereto attached.

"While he was at liberty under the suspended sentence, he was arrested at Marshall, Texas, on an order of the United States District Court for the Eastern District of Texas, Tyler Division, * * * that instead of being taken before said court at Tyler, Texas, and given a hearing as provided by law and the Constitution of the United States, he was on August 11, 1933, brought directly from Paris, Texas, by a deputy United States marshal * * * and [fol. 39] surrendered to the warden of the United States penitentiary at Leavenworth, Kansas, where he has at all times since been imprisoned.

"That by reason of the fact that he was brought directly to the United States penitentiary at Leavenworth, Kansas, without such hearing before the court that sentenced him, he is lawfully imprisoned and restrained of his liberty."

The copy of the judgment and sentence attached to the petition recites that:

"On the 10th day of October, A. D. 1932, the defendant again appearing and being asked by the court if he had anything to say why the judgment and sentence of the court should not be pronounced upon him, in accordance with his confessed plea of guilty, entered in this cause on the 5th day of October, A. D. 1932, and no good cause being shown why the judgment and sentence should not be pronounced herein;

"It is, therefore, considered by the court and so ordered, adjudged and decreed that the defendant is guilty of violation of the National Motor Vehicle Theft Act, to-wit: of unlawfully, knowingly, fraudulently and feloniously transporting in interstate commerce from New Orleans, in the State of Louisiana, to Marshall, in the State of Texas, a certain motor vehicle, a Chevrolet roadster, knowing same

to have been stolen property as charged in the indictment herein, and his punishment is fixed and assessed as follows:

"That the defendant be imprisoned in the United States penitentiary at Leavenworth, Kansas, for a period of four (4) years and six (6) months.

"It appearing to the satisfaction of the court that the ends of justice and the best interest of the public, as well as that of the defendant will be subserved by the suspension of the execution of the sentence pronounced herein;

"It is therefore considered by the court, and so ordered, that said sentence be and the same is hereby suspended for [fol. 40] a period of five (5) years on conditions of probation and the defendant be placed in charge of the district probation officer for that length of time."

Following this is an order of that court as follows:

"That the suspended sentence heretofore granted the defendant be, and the same is hereby in all things revoked, and the clerk will issue a commitment and deliver the same to the United States marshal for execution. This August 5, 1933."

In his answer the warden substantially admits the allegations of the petition that the order of August 5, 1933, revoking the order of probation of five years and the suspension of the sentence of fours years and six months in the penitentiary at Leavenworth, was made in the absence of the defendant. Numerous matters are set up in the answer of the warden apparently in palliation of and as an excuse for the failure of the officer to take petitioner forthwith before the court as required by Section 725 both before and after its amendment on June 16, 1933. Only such part of the numerous matters set up in the answer of the warden will be given as tend to complete the court records in part attached to the petition.

In addition to the court records attached to the petition of appellant, certified copies of the following are attached to the answer of the warden: an application of the probation officer, filed July 29, 1933, alleging that Jack Escoe, the probationer, had violated the provisions of his probation stated generally, and in which he asked: "For an order to issue capias for the arrest of the defendant and deliver the same to probation officer to the end that the defendant

may be placed in jail, a motion prepared for the revocation of his suspended sentence and commitment to the United States penitentiary to serve the sentence originally imposed."

The record shows that on the same day the court made the following order:

"The foregoing application of probation officer having been heard and considered by the court,

[fol. 41] "Ordered that the clerk file this motion and issue a capias for the arrest of said defendant and deliver the same to Oscar S. Gresham, United States probation officer."

Following this is a warrant bearing date July 31st for the arrest of the probationer Escoe directed to the United States marshal. The return of the marshal endorsed on the warrant recites:

"Received this writ on the third day of August, 1933, and I executed the same on the fourth day of August, 1933, at Marshall, Texas, by arresting the within-named defendant Jack Escoe and now have his body in my custody."

On August 5th the probation officer filed in the court a written report respecting the conduct of Escoe the probationer in which he charged that:

"On July 29, 1933, it having come to the knowledge of probation officer that defendant had violated his conditions of probation as hereinafter shown, application was made to your Honor for an order directing the clerk to issue capias for the arrest of said Jack Escoe. The application was granted by the court on July 29, 1933, which said application for capias was forwarded to the clerk of the United States District Court for the Eastern District of Texas, Tyler, for issuance of the capias. Capias was issued and returned to probation officer. Whereupon, it was forwarded to Honorable Phil E. Baer, United States marshal, Paris, Texas, for execution and return, with the information that the defendant, Jack Escoe, would be found in the county jail at Marshall, Texas.

"One of the conditions of probation prescribed by the court in this case was: (a) Refrain from the violation of any State or Federal penal laws.

"Another condition of probation prescribed by the court was: (b) Lead a clean, honest and temperate life.

[fol. 42] "The defendant Jack Escoe, has violated the two conditions of probation above set out in this: He forged the name of his father, A. Escoe, to a check for $10.00 and passed the same to the Sugar Bowl Cafe. He likewise forged his father's name to a check for $15.00 and passed the same on one Leonard Johnson, thus committing, under the laws of the State of Texas, two felonious acts.

"The defendant, Jack Escoe, for several days prior to the time he committed the felonious acts above stated, had been intoxicated.

"Wherefore, probation officer files this motion and asks the court for an order revoking the suspended sentence of the said Jack Escoe and directing the clerk to issue a commitment to the United States penitentiary at Leavenworth, Kansas, to serve the sentence of four and a half years originally imposed.

"Probation officer submits to the court herewith a detailed history of the defendant, of his attempted supervision and of his past criminal record."

Then follows the order of the court dated August 5, 1933, already quoted in part, which, quoted in full, recites:

"The foregoing motion having been heard and considered by the court:

"Ordered, that the suspended sentence hertofore on, to-wit: October 10, 1933, be, and the same is hereby in all things revoked. The clerk will file this motion and order and issue a commitment and deliver the same to the marshal for execution."

A commitment under date of August 7th was thereupon issued under which the appellant at the time he filed his petition in the court below was being held by the appellee as warden of the Leavenworth penitentiary.

It appears from the records above set out that appellant when arrested was not forthwith taken before the court by the arresting officer and that he was not present at the [fol. 43] hearing of the application of the probation officer when the court on August 5, 1933, revoked the order of October 10, 1932, suspending his sentence of four years and six months in the penitentiary at Leavenworth.

It is the contention of appellant that the order of the court of August 5, 1933, revoking the order of suspension of sentence of October 10, 1932, made in his absence and

without opportunity of being heard in defense of the charges preferred against him by the probation officer, was void; that is to say, it is the contention of appellant that the court exceeded its jurisdiction when it made the order of August 5th in his absence and without affording him opportunity to defend himself against the charges preferred against him by the probation officer. It will be noted that the statute does not lay down any rule of procedure respecting either the granting of probation, the suspension of sentence, or the revocation of orders of probation or of suspension of sentence. It does provide that on arrest the probationer shall forthwith be taken before the court, presumably for the purpose of hearing and disposing of pending accusations. It is elementary and fundamental of course that no one accused of wrongdoing should be condemned in his absence and without opportunity for defense, but in view of the broad provisions of the Probation Act it does not necessarily follow that the failure to have appellant present in court and to afford him opportunity to answer the accusations made against him by the probation officer rendered the order of August 5th void; the court did not pronounce the sentence which appellant is now serving on that day; that sentence had been previously pronounced on October 10, 1932, when he was present. At that time and pursuant to the probation statute the sentence then pronounced was suspended and appellant was placed on probation for five years under the conditions specified in the application for revocation later filed by the probation officer. It is clear that the court had authority on August 5th to revoke the probation order, including the suspension of sentence made by it on October 10, 1932. It had continuing jurisdiction after that date of both the case and of [fol. 44] the person of appellant in respect to his probation. On August 5th and at the time the order revoking the suspension of sentence was made appellant was under arrest and in the custody of the United States marshal on a warrant issued at the direction of the court. It is apparent from the record that at the hearing on August 5th testimony and evidence in support of the charges made by the probation officer were taken and considered by the court, and that upon the evidence and testimony so taken the order revoking probationer's sentence was made. If the evidence so taken was untrue and the revocation of his pro-

bation and suspension of sentence unfair and unjust, the probationer long ago could have applied to the court for a re-hearing upon a proper showing made and the injustice corrected. The fact that he has never made such application tends to show that he actually has no real cause for complaint. Instead of pursuing this course he has chosen to invoke the high and privileged remedy of habeas corpus and is now asking this court to read into the Probation Act of Congress a rule of criminal procedure which would make the order of August 5th absolutely void. In this period of enlightened procedural liberalization it may not be supposed that Congress intended to or that the courts will by construction weigh down and encumber the Probation Act of Congress with the outworn technicalities of the old criminal procedure. Indeed the Supreme Court of the United States in Burns v. United States, 287 U. S. 216, has already, as we think, freed it from such barnacles. The court in that case has said:

"The Federal Probation Act * * * confers an authority commensurate with its object. It was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable. * * * Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and [fol. 45] cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, when satisfied 'that the ends of justice and the best interests of the public, as well as the defendant, will be subserved,' to suspend the imposition or execution of sentence, and 'to place the defendant upon probation for such period and upon such terms and conditions as they may deem best.'

"There is no suggestion in the statute that the scope of the discretion conferred for the purpose of making the grant is narrowed in providing for its modification or revocation. The authority for the latter purpose immediately follows that given for the former, and is in terms equally broad. 'The court may revoke or modify any condition of probation, or may change the period of probation.' There are no limiting requirements as to the formulation of charges, notice of charges, or manner of hearing or determination. No criteria for modification or revocation are suggested which are in addition to, or different from, those which pertain to the original grant. The question in both cases is whether the court is satisfied that its action will subserve the ends of justice and the best interests of both the public and the defendant. The only limitation, and this applies to both the grant and any modification of it, is that the total period of probation shall not exceed five years. * * *

"The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial dis-[fol. 46] cretion. That exercise implies conscientious judgment, not arbitrary action. * * * It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result.' * * * While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."

In the Burns case the Supreme Court held that there had been no abuse of discretion by the trial court, a question which could be considered on that appeal. Whether there was an abuse of discretion by the court of the Eastern District of Texas is not before us in this proceeding. The only question here involved is whether that court had jurisdiction to make the order of August 5th. We think it did have jurisdiction to make the order.

The judgment is affirmed.

[fol. 47] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Jan. 7, 1935

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed; and that Fred G. Zerbst, Warden of the United States Penitentiary at Leavenworth, Kansas, appellee, have and recover of and from Jack Escoe, appellant, his costs herein.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR REHEARING—Filed Feb. 4, 1935.

May it please this Honorable Court:

On January 7, 1935, this Honorable Court rendered its opinion in the above entitled cause, denying the applicant the writ of habeas corpus prayed for. The appellant, due to a lack of funds, has been unable to secure a copy of the decision rendered by this Honorable Court, and prays that this motion be considered without specific mention thereof.

Appellant earnestly contends that Section 725, Title 18, specifically provides that probationers, after arrest with or without a warrant, shall be carried before the Court for adjudication as to whether or not conditions of probation have been violated.

Appellant contends that he was never advised, either officially or unofficially why or for what reason his probation was revoked, and by not being carried before the [fol. 48] Court as specifically provided for by statute, he was denied an opportunity of being heard which is guaranteed by the Fifth Article to the Constitution of the United States.

That, by not being carried before the Court for a hearing on the alleged violations of the conditions of his probation

and formal sentence, he was denied the right of petitioning the Court for his original sentence of eighteen months.

Appellant further contends that the United States District Court of Kansas erred in permitting the United States Attorney to introduce, and be guided by, evidence used by the trial Court in revoking appellant's probation, in deciding whether or not your petitioner was unlawfully restrained of his liberty without due process of law.

Appellant earnestly believes this Honorable Court should take judicial notice of these circumstances and revise or amend the opinion of January 7, 1935. And for the other facts, circumstances and contentions herein presented, appellant submits that the opinion of January 7, 1935 be set aside and a rehearing granted upon the matter as a whole.

Wherefore, appellant ever prays.

Respectfully submitted, Jack Escoe, Pro Se.

Duly sworn to by Jack Escoe. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—Feb. 12, 1935

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

NOTE RE MANDATE

(On February 25, 1935, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.)

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed April 1, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is advanced and assigned for argument on Monday, April 29th, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: In forma pauperis. Enter Jack Escoe, pro se. File No. 39,401. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 773. Jack Escoe, Petitioner, vs. Fred G. Zerbst, Warden of the United States Penitentiary at Leavenworth, Kansas. Petition for a writ of certiorari. Filed March 9, 1935. File No. 773 O. T. 1934.

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FILE COPY

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 773

JACK ESCOE,

Petitioner,

vs.

FRED G. ZERBST, Warden of the United States Penitentiary at Leavenworth, Kansas.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Jack Escoe,
Petitioner, Pro se.

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not an attempt to escape condign punishment through legal technicality, but is rather a *bona fide* effort to test whether or not he may be imprisoned in a summary proceeding without having been afforded an opportunity to prove his innocence of the charge upon which said imprisonment is ostensibly based.

Statement of Facts.

On or about January 28, 1932, petitioner was arrested in Marshall, Texas, by State officers, for allegedly having violated the National Motor Vehicle Theft Act. He was arraigned before the United States Commissioner at Tyler, Texas, on or about February 2, 1932, and pleaded not guilty. Bail was set at $2,000, and in default thereof he was remanded to jail.

About one week later he was admitted to bail of $1,000 on February 15, 1932.

On October 4, 1932, petitioner was indicted at Tyler, Texas, for conspiracy to violate the National Motor Vehicle Theft Act, to which he pleaded guilty the succeeding day. Sentence of eighteen months' confinement in the United States penitentiary at Leavenworth, Kansas, was passed immediately and petitioner placed in the custody of the United States Marshal at Tyler to await transportation to said penitentiary.

Later the same day petitioner was called back before the court and sentence withdrawn. Thereafter, to wit, October 10, 1932 he was called back before the court again and sentenced to four years and six months confinement in the United States penitentiary at Leavenworth, Kansas, and the execution thereof suspended for five years on condition of probation to Oscar S. Gresham, Probation Officer, Tyler, Texas.

Petitioner complied with every condition of his probation and remained at liberty until July 28, 1933, when he was

arrested by State officers and placed in the county jail at Marshall, Texas, where he was held incommunicado for about eight days in spite of repeated efforts to learn the reason of his arrest and to employ counsel for the same purpose. He was then taken to the county jail at Paris, Texas. His attempts to learn the reason for his arrest and transportation again proved unavailing. He succeeded, however, in contacting an attorney who sought by telegraph and telephone to learn from Oscar Gresham or Judge Randolph Bryant why petitioner was being held.

Before the attorney's efforts bore fruit, petitioner's probation was revoked on August 5, 1933. On August 11, 1933, he was taken direct to the penitentiary at Leavenworth, Kansas, from the jail at Paris, Texas, without having been brought before the court and having heard wherein he was alleged to have violated his probation or having had an opportunity to repel such allegation, which he could have done, as petitioner *did not violate his probation.*

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas, First Division, on December 1, 1933. Hearing was had on said petition January 26, 1934, and said petition was dismissed, to which ruling of the court your petitioner duly excepted, and which exception was allowed. Appeal was taken to the Circuit Court of Appeals for the Tenth Judicial Circuit, which sustained the District Court and on February 12, 1935, overruled appellant's (your petitioner's) motion for a rehearing.

Statement of Question.

This petition seeks the determination by this Honorable Court of the answer to the following question:

Can a probation be revoked without bringing the probationer before the court and affording him an opportunity to be heard?

Summary of Argument.

I.

Revocation of probation without giving the probationer an opportunity to show that he has not violated his probation is not due process of law.

II.

Sec. 725, Title 18, United States Code, requires that the probationer be brought before the court prior to revocation of his probation.

III.

Since petitioner was neither brought before the court nor given an opportunity to be heard in his behalf, he is now illegally restrained of his liberty.

IV.

Habeas corpus is a proper remedy to test the validity of his detention in the premises, for the court was without active jurisdiction to issue the order of revocation or mittimus.

V.

Petitioner should be discharged from further confinement.

Brief and Argument.

One.

Article V of amendment to the Constitution of the United States sets out that no person shall "be deprived of life, liberty or property without due process of law."

It is submitted that an order of a Federal court, issued *ex parte*, with the person upon whom said order is to

operate held incommunicado miles away in a jail, without his knowledge or consent, and based upon a false assumption which he could repel if present, is not "due process of law" as that expression is used in the organic law.

The earliest reference to the right which the amendment intended to secure which is found in the books is that statement of the rule formulated by Seneca:

> "*Qui statuit aliquid, parte inaudita altera, aequum licet statuerit, haud aequus fuit.*"

He who prefers a charge against another, however just it may be, will himself be unjust, unless the accused be heard in his own defense. Blackstone characterizes the rule as follows: "A rule to which all municipal laws that are founded upon the principles of justice have strictly conformed." IV Bl. Com. 283. He elsewhere (IV Bl. Com. 257) states: "* * * though it is just to compel suspected persons to give security to the public against misbehavior that is apprehended, yet it would be hard, upon such *suspicion*, without the proof of any actual crime, to punish them by a forfeiture of their recognizance."

Sir Edward Coke states that the words "*aliquo modo destruatur*", in C. 29 of Magna Carta, extend not only to killing or maiming, but also to every oppression under color of legal authority. 2 Inst. 48.

The Petition of Right, 2 Car. I (1627), declares that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law.

Blackstone says: "To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole Kingdom. But confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a

more dangerous engine of arbitrary government." 1 Bl. Com. 136.

All of the foregoing statements show that the phrase "*per legem terrae*" of Magna Carta, from which our expression "due process of law" is derived, was understood to require that in any proceeding a party adversely interested was entitled to an opportunity to be heard in his own behalf to have his day in court when the amendment in which the expression occurs was adopted.

The rule is well stated in *Zeigler* v. *Railroad Co.*, 58 Ala. 599:

> "Due process implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him this is not 'due process of law.'"

In the instant case it was conclusively presumed that petitioner had violated his probation. Petitioner could have rebutted this presumption and failure to allow him opportunity to do so constituted a violation of the Fifth Amendment.

The general rule in nearly every jurisdiction wherein this question has been raised seems to be that a convicted defendant released under a suspended sentence is entitled to notice and a hearing on the issue of whether he has broken the conditions of the suspension of sentence, before the suspension may be revoked. In *State* v. *Zolantakis*, 259 Pac. 1044, the Supreme Court of Utah held that a convict having been granted a suspension of sentence during good behavior, without any limitations, is entitled to hearing, in accordance with well recognized and established rules

of judicial procedure, on the question whether he has complied with the conditions imposed, before revocation of his suspended sentence.

The court says in part:

"The purpose of the law permitting the suspension of sentence is clearly reformatory. If those who are to be reformed cannot implicitly rely upon promises or orders contained in the suspension of sentence, then we may well expect the law to fail in its purpose. The reformation can certainly best be accomplished by fair, consistent and straightforward treatment of the person sought to be reformed. It would therefore seem, both from authority and principle, that when a sentence is suspended during good behavior, without any reservations, the person whose sentence is thus suspended has a vested right to rely thereon so long as such condition is complied with. The right to personal liberty is one of the most sacred and valuable rights of a citizen, and shall not be regarded lightly. The right to personal liberty may be as valuable to one convicted of crime as to one not so inflicted, and so long as one complies with the conditions upon which such right is assured by judicial declaration, he may not be deprived of the same. Such right may not be alternatively granted and denied without just cause."

"The majority of this Court are of the opinion that a person who has a sentence suspended during good behavior, without any limitation, is entitled to a hearing upon the question of whether or not he has complied with the conditions imposed; that such hearing must be according to some well recognized and established rules of judicial procedure; that defendant is entitled to have filed either an affidavit, motion or other written pleading setting forth the facts relied upon for a revocation of the suspension of sentence; that the defendant should be given an opportunity to answer or plead to the charge made; that a hearing should be had upon the issues joined; and that the defendant as well as the State be given the right of cross-examination.

> If we are correct in our conclusion that the defendant has a vested right to his personal liberty during good behavior when so ordered without reservation in the original sentence, any proceeding failing in these essentials is error."

Again, in *Ex parte Lucero*, 168 Pac. 713, the Supreme Court of New Mexico held that a prisoner was entitled to notice and a hearing on the issue of whether he had violated the terms of a suspended sentence, before it was declared revoked. The court said:

> "It appears that the proceedings leading to the issuance of the commitment against the petitioner were entirely *ex parte*. So far it appears from the record he was not present in person, or by counsel, and had no hearing as to whether he had breached the condition. * * * *Upon principle it would seem that due process of law would require an opportunity to be heard and notice, before the defendant can be committed under suspended sentence.* The suspension of the execution of the sentence gives to the defendant a valuable right. It gives to him the right of personal liberty, which is one of the highest rights of citizenship. This right cannot be taken from him without notice and opportunity to be heard, without invading his constitutional rights."

In *State* v. *Phillips*, 185 N. C. 514, 115 S. E. 898, it was held that a convict, having been given a suspended sentence on the condition that he abstain from drink, was entitled to a notice and hearing to inquire into an alleged violation of the condition, before being sentenced to imprisonment at hard labor. The court, in support of its decision in this case said:

> "If the defendant was sentenced upon his plea of guilty, and the judgment was suspended, or its immediate execution withheld, on a condition, and the State alleged a violation of that condition, and asked for

> the enforcement of the sentence because of the violation of the condition upon which it was based, the judge should have required the defendant to appear before him, by notice or by capias, if necessary, and inquired into the allegation of the State, and, if found to be true by him, he should have enforced the judgment, or taken such other course as his finding may have justified. But he clearly had no power, or jurisdiction, to leave this important and essential judicial prerequisite to be ascertained or found by a clerk of the court, or a sheriff, and thereupon to order the imprisonment of the defendant with hard labor upon the roads of any designated county."

It is true that where the statute provides that the parole power to be exercised by the court is entirely discretionary, or where the statute makes an express reservation of the power to revoke, no judicial proceeding would be necessary to terminate a suspension of sentence, but in the case at bar there is no such provision in the statute, and the case must be therefore within the class of cases which are considered in the absence of statute.

The case of *State, ex rel. O'Connor* v. *Wolfer*, 53 Min. 135, 54 N. W. 1065, 19 L. R. A. 783, was a case in which a convict who had been sentenced to life imprisonment was pardoned on the express condition that he take up his residence outside of the State during the balance of his life. Later, on being found within the State, he was arrested and remanded to serve out his sentence. The court, in support of the view that a hearing was necessary, said:

> "The main question, and the one which presents itself at the threshold of this case, is whether a person who has been discharged on a conditional pardon can be recommitted to the State prison without any hearing or adjudication, upon the mere order of the Governor, who has assumed to determine *ex parte* that the condition of the pardon has not been performed. It seems to us that such a sentence is war-

ranted neither by law nor by a just regard for the personal liberty of the citizen. It is, of course, well settled that if a person be pardoned upon a condition, either precedent or subsequent, which he neglects to perform, the pardon is void, and he may be remanded to suffer his original sentence; but upon the question whether he has neglected to perform the condition, and is therefore liable to be thus remanded, he is entitled to a hearing and adjudication. * * * but the pardon in this case contained no such condition, and our statute is entirely silent as to the mode of procedure. The procedure, therefore, in such cases, is governed by the rules of the common law."

In *Mercer* v. *State*, 50 Fla. 24, 39 So. 481, a convict had been pardoned from a life sentence on condition that he "thereafter lead a sober, peaceful and law abiding life, failing in which the sheriff of any county is to arrest him and return him to the State's prison to complete the sentence so imposed." The board of pardons revoked his parole and issued an order for his rearrest and imprisonment. On a petition for a writ of habeas corpus, the prisoner complained that his conditional pardon had been revoked without due notice and hearing. The court, in holding that the convict was entitled to a hearing before his pardon was declared revoked, said:

"The established practice of the common law and in the American States, *in the absence of statutory regulation, and in the absence from the pardon itself of express stipulations for that purpose*, is for some court of general criminal jurisdiction, upon having its attention called, by affidavit or otherwise, to the fact that a pardoned convict has violated, or failed to comply with, the condition or conditions of his pardon, to issue a rule reciting the original judgment of conviction, and the alleged violation of, or noncompliance with, the condition or conditions thereof, and requiring the sheriff to arrest the convict *and bring him before the court to*

> *show cause*, if any he can, why the original sentence imposed upon him should not be executed. A copy of such rule should be served upon the convict at the time of his arrest."

Similarly, in the case of *State* v. *Horne*, 52 Fla. 125, 42 So. 388, it was held that a prisoner was entitled to a hearing before having his constitutional pardon revoked. The court in that case said:

> "When a convict has been released upon a conditional pardon, his rearrest and recommitment to his original sentence cannot be had upon the mere order of the Governor alone, unless such a course is provided by statute, or by the express provisions of the pardon. The petitioner (*in the absence of statute or of express provisions in the pardon to the contrary*) is entitled to a hearing before the court having jurisdiction of the writ under which he is held, in order that he may show that he has performed the condition of the pardon, or that he has a legal excuse for not having done so, or that he is not the same person who was convicted."

Again, in *People ex rel. Joyce* v. *Strassheim*, 242 Ill. 359, 90 N. E. 118, on petition for writ of habeas corpus on the ground that no hearing had been had to ascertain whether the petitioner had violated his parole, it was held that the petitioner was entitled to a hearing. The court said:

> "Under the constitutional provision that he shall not be deprived of liberty without due process of law, he is entitled to a hearing before some authority as to whether he has violated the conditions of his parole and forfeited his rights under it."

In *People ex rel. Stumpf* v. *Craig*, 140 N. Y. Sup. 652, which arose on a petition for a writ of *habeas corpus*, it appeared that a paroled prisoner was summarily rearrested and imprisoned on a wrrant issued by a police officer, who was informed under oath that the probationer had violated his parole. The probationer was arrested without

notice and without any opportunity to be heard. The court, in holding that the revocation of parole without a hearing and subsequent commitment to jail was illegal, and calling for a release, said:

> "The defendant was there protesting his innocence and demanding his right to be heard. No hearing was accorded him, and he was summarily convicted of a violation of his parole without information as to when, where, or how it had been violated; nor does it appear that the police magistrate had knowledge of it. To send a person to prison because he has violated some condition which he insists he has not, and without specifying what it is, and without giving him an opportunity to be apprised of the condition and its violation, which is claimed to have occurred, and to be heard in his own behalf, violates elementary principles of criminal jurisprudence."

And in *N. Y.* v. *Kriegel*, 207 N. Y. Sup. 646, it was said, by way of *dictum*, that a revocation of probation without a hearing, resulting in a commitment, is illegal, and in *habeas corpus* proceedings would warrant a discharge.

The foregoing statements show conclusively that it is the consensus of opinion in the State courts that the right of every person to be heard when his life, liberty or property are involved is one which must be scrupulously guarded and that any proceeding in which he is denied this right is not due process of law.

Two.

At the time the petitioner was sentenced, to wit, on October 10, 1932, the law applicable was as follows (18 U. S. C. A., Sec. 725):

> "Powers of Probation Officers; Arrest of Probationer.—When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer

from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable."

"At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. *Thereupon such probationer shall forthwith be taken before the court.* At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." (Mar. 4, 1925, c. 521, Sec. 2, 43 Stat. 1260.)

On June 16, 1933, the second paragraph of said Section 725 was amended to read as follows:

"At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest, which warrant may be executed by either the probation officer or the United States Marshal of either the district in which the probationer was put on probation or of any district other than that in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put on probation, any of said officers may *return probationer to the district out of which such warrant shall have been issued.*" (As amended June 16, 1933, c. 97, 48 Stat. 256.) (Italics ours.)

It is submitted that the above statute, as amended, requires that the probationer be brought before the court before revocation of his probation.

The purpose of the statute seems to be merely to enlarge the powers of the Marshal so that the probationer may be apprehended wherever found on warrant from the court

of the district in which probation was granted. Aside from this it continues the law as it was prior to the enactment of the statute by implication. To contend that the amendment was intended to entirely supersede the original statute is to contend that the legislature enacted a foolish amendment. If the last clause of the amendment is to be given effect it must be read in connection with the two clauses of the statute requiring that probationer be brought before the court. Properly construed, it states that "any" officer "may" return probationer, but some one of them *must* return him to the district whence issued the warrant so that he may make answer pursuant to the right granted him by the statute before amendment. It cannot reasonably be contended that the Congress passed a measure over one-third of which is surplusage. Yet such is the result if the amendment be interpreted as repealing completely the statute and not incorporating it by implication. The last clause of the amendment was obviously written with an eye to keeping the measure within the constitutional rule of "due process of law." Otherwise interpreted, it becomes a petty legislative intermeddling into the minor administrative acts of the Marshal.

The Circuit Court of Appeals (W. Va.) construing Sec. 725, in the case of *Hollandsworth* v. *United States*, specifically held that a court cannot revoke probation and sentence a probationer unless it appears, after notice and opportunity for hearing, that probationer failed to comply with the conditions of his probation. (34 F. (2d) 423.)

Petitioner believes that the Congress did not intend to dispense with this requirement when the amendment was enacted in 1933; but rather that it was expressly recognized and continued by force of the closing words of the amendment. He believes that the requirement of a hearing are to be fairly and logically inferred by its terms and thus is

within the statute as amended. (*Great Northern Ry. Co.* v. *United States*, 155 Fed. 945, 84 C. C. A. 93, aff. 208 U. S. 452, 28 Sup. Ct. 313; *United States* v. *Allen*, 179 Fed. 13, 103 C. C. A. 1.)

In construing a statute, the presumption is that the legislature intended to change the law as it theretofore existed only insofar as necessary to effectuate the purposes of the act in question. 3 Bl. Comm. 430. In the amendment under question the sole purpose of the Congress was to authorize arrest by any Marshal and return by him of the probationer to the district whence the warrant issued.

There is also a presumption that the Congress did not intend to enact a measure which is unconstitutional. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441; *Cantwell* v. *Missouri*, 199 U. S. 602, 26 Sup. Ct. 749; *Smith* v. *St. Louis Ry. Co.*, 181 U. S. 248, 21 Sup. Ct. 603. It cannot be contended that the omission of the words "brought before the court" from the amendment was intended to dispense with the necessity of such a procedure, since this would be to hold that the Congress intended to violate the inhibitions of the Fifth Amendment to the Constitution, which is untenable.

It is to be presumed that the Congress never intends to do an injustice. Co. Litt. 183. It cannot be contended that the Congress intended to eliminate a hearing which is demanded by the most elementary principles of fairness and justice if not by organic law. It is the duty of the court to give effect to every word of a law, if possible. Yet the last clause of the amendment becomes meaningless and devoid of sense if it be held that Congress intended to dispense with a hearing when it enacted the amendment. The language used must be so construed that all words are given meaning. When the language used is elliptical, the words which are obviously necessary to complete the sense will be supplied. It is manifest that the words "for the

purpose of a hearing" are to be added to the last sentence of the amendment if it is to express the intent of the legislature.

It is always permissible to look to the context to discover the legislative intent. The statute and amendment under consideration are part of Title 18, United States Code, dealing with probation. The amendment requires that the probationer be brought back to the district where probation was granted when arrested on warrant by an officer outside the district. Why should he be returned? Obviously for but one purpose; that the question of his violation may be investigated *in his presence* by the court which granted his probation.

There is a presumption that the Congress did not intend to repeal Sec. 725, by repealing it entirely. To so hold would result in the startling situation of a court having power to arrest a probationer, but not revoke his probation, for the power to revoke probation is found in Sec. 725, but not in the amendment. The questionable logic which would exclude the necessity of a hearing since the amendment would likewise simultaneously withdraw from the court the power to revoke probation once granted, an absurd consequence and patently untenable.

The Congress cannot be presumed to have intended an innovation on the common law, and its enactments cannot be extended, in directions contrary to the common law, further than required by the express terms employed. Nothing contained in the amendment can be thought to show the congressional intent to change the common law requirement of a hearing in all cases where a man's liberty is in jeopardy.

Sec. 725, Title 18, United States Code, as amended, requires that the probationer be brought before the court. Failure to do so in the instant case renders the orders entered utterly void and without effect in law.

Three.

Petitioner believes that he is now illegally imprisoned in violation of the Constitutional requirement of due process and in violation of the statute.

Petitioner was committed to the penitentiary after granting of a motion of the probation officer to revoke his probation. He was not given an opportunity to pray for his original sentence of eighteen months; which he has now more than served. He was not given an opportunity to inquire into the reasons for the filing of the motion, which does not specifically recite them. Why was the motion filed? After nearly two years of diligent effort by himself, his mother and his friends, petitioner has yet to discover just wherein he is alleged to have violated the conditions of his probation. Is he to remain in perpetual ignorance of which of his acts were deemed to be sufficiently offensive to society to merit loss of his liberty for years? Can it be seriously contended that the American people intend that a mere administrative officer of the court was to be clothed with unquestioned authority to institute proceedings involving loss of liberty without cause shown or opportunity for impeachment? To reply affirmatively to either question is to shock the sense of justice which is one of our most cherished heritages.

Upon being admitted to the penitentiary, petitioner forwarded a motion to the District Court from which he was committed praying that he be given an opportunity to be heard in his defense and that he be apprised specifically of how he had violated his probation. This motion was returned to petitioner by letter signed by the Honorable Randolph Bryant which flatly refused to allow the motion to be filed. No comment was included.

Four.

Was *habeas corpus* available as a remedy to test the validity of the orders revoking petitioner's probation and

committing him to the penitentiary? In the court below appellee contended that a valid jurisdiction of both person and subject matter existed and the sentence was within that authorized and hence that the orders were open to attack only by appeal therefrom and not by *habeas corpus*. Petitioner denies that a proper jurisdiction of the person had attached in the premises and that as a result the orders were *coram non judice* and open to attack by *habeas corpus*.

The resolution of this difference involves the determination of what specifically amounts to a valid jurisdiction of the person. Petitioner maintains that custody and jurisdiction of the person are not synonymous; that something more than mere apprehension is necessary. Suppose, for example, that John Doe is served with the warrant. Has jurisdiction of the person of John Doe attached? Obviously not. Suppose further an order is now entered revoking Doe's probation and committing him. Doe is promptly hurried off to the penitentiary. How is Doe to challenge this order? The appellee below contends his remedy is by appeal. We then have the extraordinary anomaly of Doe admitting that he is Doe so that he can appeal, and denying that he is Doe in the appellate court! Or the equally amusing case of Doe denying that he is a party to the suit and seeking to carry it forward by appeal!

Petitioner believes that as a usual rule the person has not attached sufficiently to render an order valid until the party has appeared in open court and admitted that he is the party contemplated. He believes further that if the person should appear in court and deny his identity and therefore the court's jurisdiction that no jurisdiction would attach until he was judicially found to be the correct person.

Petitioner grants that potential jurisdiction of his person was present, but maintains that before active jurisdic-

tion could be got, it was necessary that he be brought into court, where he should thereupon be given an opportunity to be heard. If he sought to exonerate himself, jurisdiction would attach *ipso facto*. Likewise if he submitted, but if he thereupon challenged the jurisdiction of the court, it could not attach until the reasons for his challenge had been investigated.

It is manifest, therefore, that there is a jurisdictional question involved and that *habeas corpus* is a proper remedy. Petitioner does not seek a review of the exercise of a discretion; he denies that the power to exercise the discretion with reference to him existed at all. He does not maintain that the court abused a discretionary power and that this abuse should be remedied; he rather maintains that an order has been executed on him which was issued in a proceeding to which he was not a party and which was *coram non judice*, void and of no effect.

The District Court to which your petitioner directed his original petition for writ of *habeas corpus* is invested with statutory authority to grant the writ. Sec. 451, Title 25, U. S. C.

The courts have repeatedly held *habeas corpus* to be proper remedy to inquire into the legality of imprisonment where jurisdiction is wanting or a constitutional right has been invaded. *U. S.* v. *Harden*, 10 Fed. 802; *Ex parte Mikell*, 253 Fed. 817; *Yow* v. *U. S.*, 208 U. S. 8, 28 Sup. Ct. 201; *Craig* v. *Hecht*, 260 U. S. 714, 43 Sup. Ct. 90, and decree affirmed 263 U. S. 255, 44 Sup. Ct. 103.

Five.

In the above premises petitioner believes he should be discharged from further confinement. He has now been incarcerated beyond the length of his original sentence upon a commitment without legal foundation.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Honorable Court directed to the United States Circuit Court of Appeals sitting at Denver, Colorado, commanding the said court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court and District Court had in this case, to the end that said proceedings may be reviewed by this Court, and that upon a full examination of the record the judgment of the said Circuit Court be reversed, and for such other relief as to this Court shall seem proper.

JACK ESCOE,
Petitioner, Pro se.

In the United States Supreme Court of America, October Term, A. D. 1934.

STATE OF KANSAS,
County of Leavenworth, ss:

Before me on this day personally appeared Jack Escoe, petitioner in the foregoing petition addressed to the Supreme Court of the United States of America, who, being by me first duly sworn, deposes and says that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

JACK ESCOE,
Affiant.

Sworn to and subscribed before me, a notary public, this 5th day of March, A. D. 1935.

[SEAL.] E. H. ECKHOLDT,
Notary Public.

My commission expires April 29, A. D. 1935.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 773

JACK ESCOE,

Petitioner,

vs.

FRED G. ZERBST, Warden of the United States Penitentiary at Leavenworth, Kansas.

SUPPLEMENTAL BRIEF FOR PETITIONER.

The following memorandum, supplemental to the Brief included with the original Petition, is submitted on behalf of petitioner:

I.

Does the revocation of petitioner's probation present here a question of discretion in the District Court, or a question as to the jurisdiction of such court to make the order of revocation?

Regardless of the propriety of review here, it seems reasonably clear that the trial court erred in not bringing petitioner before the Court for hearing, before making any order of revocation.

The authorities heretofore cited by petitioner support this conclusion. Others might be cited, to the same effect. We have found no Federal case where any different rule was approved. In all cases, hearings were duly had. The case of *Burns* v. *United States* (287 U. S. 216), is not opposed, as a hearing before revocation was had in that case. The Circuit Court of Appeals below expressed its approval of such right in petitioner, but then held that the law did not require the *presence* of the petitioner at such hearing.

That the statute itself required the *production* of the petitioner *before the trial court*, seems clear.

The original Act (43 Stat. 1260) specifically so provided, stating "thereupon such probationer shall *forthwith* be taken before the Court." (Italics ours.) The amendment in the Act of June 16, 1933, did not eliminate the quoted provision. Such amendment (48 Stat. 256) states "that the *first* sentence of the *second* paragraph of Section 2 of the Act of March 4, 1925 is amended to read as follows:"

The *first* paragraph of the Act of March 4, 1925, ends with the word "advisable."

The *first* sentence of the *second* paragraph, referred to in the amendment, begins with the word "at" and ends with the word "arrest." (See pages 12-13-Petition.) This is the sentence for which the amendment in the Act of June 16, 1933, must be substituted.

The remainder of the Act therefore remains unchanged, and as unchanged, retains the requirement which is the *second* sentence of such *second* paragraph, specifically providing, that, after the issuance of the warrant and the arrest of the probationer, "thereupon such probationer shall be *forthwith* taken before the court." The court below apparently recognizing this situation, noted the statutory requirement above quoted, but stated that, notwithstanding

the language of the statute, the *presence* of the probationer before the court on such a hearing was legally unnecessary. In other words, the court below approved the proposition that the "forthwith" appearance of the probationer before the court, as provided in the statute, might be dispensed with through an *ex parte* hearing before the court *in the absence of probationer!* Save the decision below, such a proposition is utterly without support in either the federal or State authorities.

We therefore conclude that not only are the decisions generally in support of the right to a hearing before revocation of parole or probation, but that the controlling federal statute here applicable specifically grants such right.

The question thus is presented, whether the denial of such right partakes of the *discretion* of the trial court, or whether a hearing is a *jurisdictional prerequisite* to action by the court in revocation of the existing suspension of sentence.

Petitioner here asserts that the question is one of jurisdiction and not of discretion. It is true that this Court in the *Burns* case stated that probation was a privilege, and not a right, yet the Court, in effect, affirms the right of the probationer, once the privilege has been granted, "to possess such privilege." Thus lawfully *possessing* it, may it be arbitrarily withdrawn from the possessor, in disregard of the specific language of the statute, which statute is the source of the court's power?

The possession of this privilege involves the essential reformative basis for the passage of the law as pointed out by this Court in *Murray v. United States*, 275 U. S. 347. It is the basis for the hope of probationer to attain self rehabilitation. His status as a prisoner on probation is essentially difficult. He is subjected to the fear, apprehension, suspicion and hostility of many of the public. He is especially subject to erroneous and mistaken suspicion. He

is in possession of a privilege which Congress authorized the court to grant, in order as this Court has said to "pluck a brand from the burning." Its withdrawal evidences the complete elimination, so far as probationer is concerned, of any benefit resulting from the Act of Congress. It is therefore of supreme importance even greater than the original privilege of probation, that such a person once having been given liberty, and a new chance, to be given an opportunity to show the propriety of his retention of this supremely valuable privilege, in accord with the specific direction of the statute.

We submit, therefore, that the duty of the trial court to obey the statute and bring the probationer before him "*forthwith*", may not be considered a matter of discretion, but, instead, constitutes a *jurisdictional prerequisite* to the withdrawal of the privilege, which privilege, under the law, the court has deliberately placed in the possession of probationer.

II.

Habeas corpus is an appropriate remedy where jurisdiction is questioned, and has been commonly used in cases analogous to the case at bar.

Thus the question here is one of *jurisdiction*, not one of *discretion*. Being a question of jurisdiction, *habeas corpus* will lie, because, while the court may have had jurisdiction of the subject matter, and of the person, it still must have had jurisdiction to do the act which deprived the defendant of liberty. This jurisdiction must come from the power granted in the statute, and should not be held to exist in event of non-compliance with the statute.

Failure of jurisdiction in this regard, prevents the act of the court in taking away the liberty of the probationer, from constituting due process of law under the Fifth Amendment.

Under such circumstances *habeas corpus* is, under the authorities, an appropriate and usual remedy.

12 R. C. L. 1244.

Church on Habeas Corpus (2nd Ed.) 458-458 (c).

State v. *Stair*, 185 N. W. 301 (N. D.).

Ex parte Albori, 21 Pac. (2d) 423 (1933) (Calif.).

In re Ridley, 300 Pac. 549 (Okla.).

People v. *Hunt*, 270 N. Y. S. 248 (1934).

Re Knowlton, 68 Pac. 480 (Calif.).

Ex parte Urbanowicz, 24 F. (2d) 574 D. C. (Kan.).

(See cases cited brief, original petition.)

Analogy may be found in the approved use of *habeas corpus*, in cases involving hearings in immigration cases.

Chin Yow v. *U. S.*, 28 Sup. Ct. Rep. 201.

Ng Fung Ho v. *White*, 259 U. S. 276.

III.

The court below therefore, we submit, erred in holding that the refusal to bring petitioner before the court before revoking probation, was in the *sound discretion* of the trial court, and in further holding that the record before the court presented *only* a question of abuse of discretion, not reviewable on *habeas corpus*. *Burns* v. *United States*, though quoted, is no authority for such a conclusion. Such case presented only questions as to procedure on an actual hearing before revocation, not the complete failure to comply with the express mandate of the statute.

This Court said in the *Burns* case, "while probation is a matter of grace, the probationer is entitled to fair treatment and is not to be made the victim of whim or caprice—There is, properly speaking, no question here of notice. Defendant was brought before the court and questioned."

IV.

What the trial court did, concerning the report of the Probation Officer, without notice to, and in the absence of, probationer, cannot be held a compliance with the statute. Petitioner endeavored, by motion, to secure a hearing but his attempt was ignored. (Pet. 11.) Nor can the fact that evidence concerning the reasons for *originally* revoking probation, may have been taken on the *habeas corpus* hearing, suffice to excuse the admitted original want of hearing required under the law. Hence the absence of a bill of exceptions, containing the evidence in the *habeas corpus* proceeding, may not here serve to support the judgment below. It being conceded that petitioner was not given a hearing prior to the revocation of his probation, the absence of the evidence taken in the *habeas corpus* proceeding becomes immaterial.

It would seem to follow, that, until probationer is granted the hearing to which, under the law he seems entitled, his present imprisonment is illegal, and the order of the District court, and the commitment thereunder, is not due process of law, and that this Court may extend suitable relief in a *habeas corpus* proceeding.

SETH W. RICHARDSON,
Washington, D. C.,
On behalf of Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 773

JACK ESCOE, PETITIONER

v.

FRED G. ZERBST, WARDEN OF THE UNITED STATES Penitentiary at Leavenworth, Kansas

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The order of the District Court for the District of Kansas, denying a motion to dismiss the petition for writ of habeas corpus and denying the writ, appears at R. 20. The opinion of the Circuit Court of Appeals (R. 28–36) is reported in 74 F. (2d) 924.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 7, 1935 (R. 37). A petition for rehearing was denied February 12, 1935 (R. 38). The petition for the writ of certiorari was

filed in this Court March 9, 1935, and was granted April 1, 1935 (R. 39). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether it is necessary that petitioner be brought personally before the court before proceedings could be had to revoke his probation and order his commitment.

2. Whether failure to grant such a hearing before commitment justifies the issuance of a writ of habeas corpus.

STATUTES INVOLVED

The pertinent statutory provisions will be found in Appendix A, *infra*, pp. 35–39.

STATEMENT

The petitioner, Jack Escoe, was indicted in the Eastern District of Texas for violation of the National Motor Vehicle Theft Act (R. 4), on October 4, 1932, pleaded guilty (R. 5), and on October 10, 1932, the petitioner was sentenced to a term of four and one-half years in the penitentiary at Leavenworth, Kansas (R. 5). On the same day, October 10, 1932, the said sentence was suspended for a period of five years on conditions of probation,[1] and the petitioner was placed in charge of the Probation Officer for that District for that length of time (R. 6, 17).

[1] A form of the Conditions of Probation is printed as Appendix B hereto, *infra*, p. 41.

By agreement of counsel at the time of the hearing before the Circuit Court of Appeals certain documentary evidence as to the reasons for the revocation of probation were inserted in the record. There, therefore, appears therein a letter of July 27, Oscar Gresham, Probation Officer (R. 10); letter from Oscar Gresham, Probation Officer, to A. Escoe, father of petitioner (R. 11); letter of July 30, 1933, written by A. Escoe and Mrs. Escoe, father and mother of petitioner, to the Probation Officer (R. 12), and letter of July 31, 1933, Probation Officer, to Mr. A. Escoe, father of petitioner. (R. 13).

From the letters sent to the Probation Officer by the petitioner's parents it would appear that the Probation Officer had evidence of violation in that the petitioner had been drunk four or five days and had forged two checks. In the second letter the names of the payee of the two checks for $10 and $15 were given, the father stating that his name had been forged to both of these checks (R. 12). The contents of these letters were duly communicated to the court (R. 16, 17, 18).

On July 29, 1933, the Probation Officer made application to the District Court to revoke the probation of the petitioner (R. 14), and the court ordered capias for the arrest of the defendant and his delivery to the Probation Officer (R. 15), which was executed on August 4, 1933 (R. 16).

On August 5, 1933, the report of the Probation Officer was filed with the District Court, with

which a motion was filed asking the court for an order revoking the suspended sentence of the petitioner (R. 16 17), and on August 5, 1933, the Judge of the District Court issued a committment ordering the Marshal to forthwith deliver the petitioner to the Warden of the Leavenworth Penitentiary (R. 18 19). The return of the Marshal indicates that on August 12, 1933, said petitioner was delivered to the Warden of the Leavenworth Penitentiary (R. 19).

It is true that these documents do not show that petitioner was personally brought before the court at the time the matter of the revocation of probation, and his arrest therefor, were under consideration by the court.

The petitioner contended in his petition for writ of habeas corpus (R. 1) that because he was not personally brought before the court at the time when the revocation of his probation was under consideration he was entitled to be discharged from further confinement in the penitentiary. He did not pray that he be taken back to the District Court and be given a hearing on the revocation of his probation.

Motion of the respondent to dismiss the petition for writ of habeas corpus was denied, and the respondent filed an answer setting out copies of the record already referred to. After a hearing on the response to the petitioner and the reply to the response, the court denied the petition for writ of habeas corpus (R. 20).

The petitioner duly filed his petition for appeal on March 27, 1934 (R. 22), alleging, in the assignment of errors (R. 23), that the District Court erred in ruling that probation could be revoked without opportunity for hearing. The Circuit Court of Appeals for the Tenth Circuit in its opinion rendered January 7, 1935 (R. 28), affirmed the judgment of the District Court in the following language (R. 34, 35):

> It will be noted that the statute does not lay down any rule of procedure respecting either the granting of probation, the suspension of sentence, or the revocation of orders of probation or of suspension of sentence. It does provide that on arrest the probationer shall forthwith be taken before the court, presumably for the purpose of hearing and disposing of pending accusations. It is elementary and fundamental of course that no one accused of wrongdoing should be condemned in his absence and without opportunity for defense, but in view of the broad provisions of the Probation Act it does not necessarily follow that the failure to have appellant present in court and to afford him opportunity to answer the accusations made against him by the probation officer rendered the order of August 5th void; the court did not pronounce the sentence which appellant is now serving on that day; that sentence had been previously pronounced on October 10, 1932, when he was present. At that time and pursuant to the probation statute the sentence then pro-

nounced was suspended and appellant was placed on probation for five years under the conditions specified in the application for revocation later filed by the probation officer. It is clear that the court had authority on August 5th to revoke the probation order, including the suspension of sentence made by it on October 10, 1932. It had continuing jurisdiction after that date of both the case and of the person of appellant in respect to his probation. On August 5th and at the time the order revoking the suspension of sentence was made appellant was under arrest and in the custody of the United States marshal on a warrant issued at the direction of the court. It is apparent from the record that at the hearing on August 5th testimony and evidence in support of the charges made by the probation officer were taken and considered by the court, and that upon the evidence and testimony so taken the order revoking probationer's sentence was made. If the evidence so taken was untrue and the revocation of his probation and suspension of sentence unfair and unjust, the probationer long ago could have applied to the court for a rehearing upon a proper showing made and the injustice corrected. The fact that he has never made such application tends to show that he actually has no real cause for complaint. Instead of pursuing this course he has chosen to invoke the high and privileged remedy of habeas corpus and is now asking this court to read into the Probation Act of Congress a rule of crimi-

nal procedure which would make the order of August 5th absolutely void. In this period of enlightened procedural liberalization it may not be supposed that Congress intended to or that the courts will by construction weigh down and encumber the Probation Act of Congress with the outworn technicalities of the old criminal-procedure.

SUMMARY OF ARGUMENT

In the exercise of that discretion so necessary to the proper functioning of the probation system the Judge, after an investigation of the facts, ordered the revocation of probation and put the original sentence into effect. The defendant has had his day in court, his sentence originally imposed has not been increased and he cannot be heard to complain at its imposition. He has had due process of law in the trial of the original case.

No substantial rights of the petitioner have been invaded. According to his petition for certiorari he employed counsel, who had eight days to communicate with the court between date of arrest and commitment. The opportunity was open to him to ask for reconsideration by the trial judge, stating through his attorney or in writing, his side of the case.

The court had jurisdiction to make the order of revocation and there was no abuse of the discretion vested in the court. In many cases a hearing is no doubt advisable but to rule that a hearing is a *sine qua non* which *must* precede every revocation would give rise to many unmeritorious appeals and seri-

ously hamper the administration of the Probation Act.

Even if there were merit in the petitioner's contention habeas corpus is not the proper remedy.

ARGUMENT

I

PROBATION IS A MEANS OF SOCIAL ADAPTATION

In order that probation may be an effective instrument in the treatment of the reformable type of criminal it is important that the trial courts should be left free to administer it promptly and expeditiously and it would not seem to be in the public interest to hamper its administration with many of the restrictions which must of necessity surround the more formal occasion when the guilt or innocence of the defendant is under consideration.

On both of the two occasions heretofore when the construction of the probation statute (Secs. 725, 726, Title 18, U. S. C., 43 Stat. 1259) was under consideration, first in the case of *United States* v. *Murray*, 275 U. S. 347, and second, in the case of *Burns* v. *United States*, 287 U. S. 216, the need for flexibility in the operation of the Act was definitely recognized by this Court.

Although delayed by the decision in the *Killits Case*, 242 U. S. 27, until the passage of the appropriate statutes in 1925, 1930, and 1933, Federal probation has had rapid and satisfactory development.

Reports of the Department of Justice reflect that there are now 114 duly qualified probation officers and 79 clerks engaged in the work of investigation preparatory to sentence and supervision of conduct during the term of probation. As compared with 18,385 undergoing sentence at the end of the fiscal year (June 30) of 1933, there were 30,870 Federal offenders on probation. A large percentage of those *taken* on probation were prohibition violators (81.9 percent) and while, owing to the shorter sentences the proportion of this type of offender *carried* on probation was not as large as this, nevertheless, this group accounts for more than a majority of those on probation in the Federal courts. The expected decrease in the number of probationers carried is therefore now being noted.

On April 12, 1935, approximately 17,000 offenders were under probation supervision, as compared to 14,796 prisoners in Federal institutions and 5,821 Federal prisoners in local jails, a total of 20,617.

In spite of the heavy case load surprisingly gratifying results have been reported. During the fiscal year 1934 there were—

On probation at beginning of year	30,870
Taken on probation during the year	8,583
On probation at end of year	22,926
Discharged from probation during year	16,627
Probation revoked for violation	868

See Attorney General's Report for the year ended June 30, 1934, p. 207.

These figures would seem to bear out the statement made in the Report of the Committee of the Judiciary at the time the Probation Act was under consideration (House Report No. 1377, 68th Cong., 2d Session):

> The result of long experience with the probation system shows that it is far easier to reclaim an unhardened early offender without commitment to a prison than after it.

The decisions in the *Murray* and *Burns* cases, *supra*, with opinion in each instance by the Chief Justice of this Court, have been the only two since its enactment in which the provisions of the statute were directly in issue. These clear and humane interpretations of the law and the progressive expositions of the theory of probation contained therein have firmly established this modern penal device as one of the most scientific and effective weapons in our defense against crime, and have aided in its wise utilization by our Federal judges.

In *United States* v. *Maisel*, 26 F. (2d) 275, 276 (S. D. Tex.), the court felt that:

> The statute in effect has accomplished at one stroke for the federal courts the redramatization of the criminal law. * * * And so at last there is set up in the criminal laws of the United States a statute to equalize and correct that wherein, by reason of its universality, the criminal law is deficient, under which the court may straightforwardly, and as upon obligation to do justice, be governed by the equitable considerations

> which arise out of and inhere in the particular case, and dispose of the prisoner accordingly, * * *.

The grant of probation is everywhere referred to as a matter of grace rather than of right. *Campbell* v. *Aderhold*, 36 F. (2d) 366 (N. D. Ga.), contains a typical statement to this effect and it may be said to represent the recorded attitude of both State and Federal courts toward the granting of probation.

Probation is defined in *Santis* v. *Esola*, 50 F. (2d) 516, 517 (C. C. A. 9th), as follows:

> "Probation" simply means enlarging a person subject to commitment by suspension of sentence, during the regularity of conduct, and imposing conditions, and on default thereof arrest and commit until imprisonment is served or the judgment is satisfied.

In *Evans* v. *District Judge*, 12 F. (2d) 64 (C. C. A. 6th), the court said:

> In our judgment the act does not contemplate that requests to be put on probation should be the subject of formal applications, hearings, and orders, until there may be an order granting. We think, rather, that the power is to be exercised by the court upon its own motion, and only as a matter of extraordinary grace justified by extraordinary circumstances. The exercise of the power is plainly and purely discretionary. If probation is refused, it cannot concern this court whether the reason for the refusal is good or bad. Doubtless the District Courts

will permit suggestions on the subject, in cases where the matter has not been fully considered in imposing sentence; but they cannot permit formal or extended hearings without assuming a burden which would be very great, and which we do not believe was intended by the statute.

II

AND ITS ADMINISTRATION IS NOT A MATTER OF FORMAL PROCEDURE

If the court in the exercise of its discretion under the probation statute is to be left entirely free to work out the reformation of certain offenders by *placing* suitable cases upon probation, it is, *a fortiori*, important that unnecessary formalities should not stand in the way of the prompt action of the court and the probation system to *revoke* the granting of this favor without delay and in the public interest.

As stated by the court in *Moss* v. *United States*, 72 F. (2d) 30 (C. C. A. 4th), it would seem that "if probation was granted to the defendant in the pending case, the actions of the court on November 28 and December 4, 1933, might be considered a valid revocation thereof, since revocation of probation is not a matter of formal procedure either with respect to notice or specification of charges or trial thereon."

See also: *Furrow* v. *United States*, 46 F. (2d) 647 (C. C. A. 4th); *Riggs* v. *United States*, 14 F. (2d) 5, 9, 10 (C. C. A. 4th); *Dillingham* v. *United States* (C. C. A. 5th), decided March 7, 1935.

III

THE PETITIONER WAS NOT ENTITLED AS OF RIGHT TO BE PERSONALLY PRESENT IN COURT AS A PREREQUISITE TO A REVOCATION OF HIS PROBATION

A revocation of probation without giving the probationer an opportunity to be heard apart from direct statutory provisions does not contravene the constitutional requirement for due process of law.

The determination of the guilt or innocence of the accused around which the Constitution has placed certain safeguards is not in issue where revocation of probation is proposed. The defendant has had his day in court, with the right to jury trial and appeal; and a later revocation of probation as to a sentence which was suspended for his benefit does not endue him with any new or additional right or constitutional right. The infliction of the penalty which he accepted has been merely postponed on terms satisfactory to him, to be reimposed subject to the judgment of the court. See *Finer* v. *Commonwealth of Massachusetts*, 250 Mass. 493, *infra*. In fact, see *Weber* v. *State*, 58 Ohio St. 616; 51 N. E. 116, which states, "The suspension being in favor of the prisoner, is for his benefit, and is valid whether consented to by him or not."

Where he is threatened with the revocation of his probation he is not being placed on trial for the commission of a new offense or solely for his failure to abide by the rules of his probation, but he is to be punished for the original offense, on the trial of which original offense all of his constitutional safe-

guards were preserved to him. See *Darrow* v. *United States*, 46 F. (2d) 647 (C. C. A. 4th); *Campbell* v. *Aderhold*, 30 F. (2d) 306 (N. D. Ga.); *Riggs* v. *United States*, 14 F. (2d) 5, 9, 10 (C. C. A. 4th).

The instant case is not in the class discussed in *Frank* v. *Mangum*, 237 U. S. 309.

There the majority of the court held that the voluntary absence from the court room of the defendant and his counsel did not invalidate the verdict rendered against him.

Even Holmes, J., in rendering a dissenting opinion on that phase of the habeas corpus appeal which had to do with mob domination in the course of the trial, said (p. 346):

> * * * we never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States.

In our case defendant pleaded guilty and *was* present at all stages up to and including sentence.

While there is one Federal court case and a number of cases in our state courts which seem to hold that as a matter of law a probationer is entitled to hearing before revocation, there are decisions which hold to the contrary.

Couture v. *Brown*, 82 N. H. 459, 461; 135 Atlantic 330. In that case, which was a petition for writ of habeas corpus, the sentence of the court was as follows: "Fine of $100 and thirty days in jail, jail sentence suspended on payment of fine and

costs; mittimus to issue on call of county solicitor." Within the thirty day period, on the request of the solicitor, a mittimus was issued in compliance with this request, without notice to petitioner and without hearing. The court stated:

> The petitioner was not entitled as of right to any indulgence whatever. The stay of sentence was a favor to him, and having accepted that favor he cannot now be heard to say that the condition on which it was granted is invalid.

The Supreme Court of Iowa in *Pagano* v. *Beehly*, 211 Ia. 1294; 232 N. W. 798, 799, 800, under a statute which read, "a suspension of a sentence by the court * * * may be revoked at any time, without notice, by the court or judge, and the defendant committed in obedience to such judgment", in annulling the writ of certiorari, said:

> * * * being a matter of grace and forbearance on the part of the sovereign, the defendant acquired no vested rights, and therefore, under the statutory provisions, he would not be entitled to notice and opportunity to be heard.

See also *People* v. *Goodrich*, 149 N. Y. Supp. 406, 412, in which the court said:

> I think the suspension of judgment in this case was a matter of grace, not of right, to the defendant, that she thereby acquired no vested rights, and the court had the right in its discretion to cancel and revoke the same.

> In any event, all that was required was to call to its attention facts that satisfied the conscience of the court that the defendant had violated the terms of her parole.

See also *People* v. *Trombly*, 173 App. Div. 497; *People* v. *Dudley*, 173 Mich. 389; *Commonwealth* v. *Fox*, 69 Pa. Superior Ct. 456; *City of New York* v. *Kriegal*, 207 N. Y. Supp. 646.

The only Federal case which passed upon the question of notice to the probationer is *Hollandsworth* v. *United States*, 34 F. (2d) 423 (C. C. A. 4th). The court observed in the course of its opinion, which affirmed the judgment of the District Court denying the appeal of the plaintiff for discharge, that the probationer "may not be sentenced until he has been given notice of the specific charge and an opportunity to be heard in his defense, and until the court, upon hearing, shall have judicially determined that his conduct during the probation period has not conformed to the course outlined in the order of probation."

This observation seems to have been unnecessary to the conclusion reached, which was that the defendant had suffered no injury from the omission of the terms of probation from the formal order of the court. See *Commonwealth* v. *McGovern*, 183 Mass. 238.

This *dictum* should be considered in connection with a later observation of the same judge, Soper, in *Moss* v. *United States, supra*,—"* * * since revocation of probation is not a matter of formal

procedure, either with respect to notice or specification of charges or trial thereon."

The leading case in the state courts cited by the petitioner is *State* v. *Zolantakis*, 259 Pac. 1044, 1047. This was a three to two decision and the language of Mr. Justice Cherry in the dissenting opinion is as follows:

> When the execution of a sentence is suspended, it is not vacated. The judgment itself is not impaired or limited. The time for its execution is merely deferred. While under a suspended sentence, a duly convicted person is not freed from the legal consequences of his guilt. He is merely enjoying a conditional favor, postponing his punishment, which may be withdrawn. *When the suspension is revoked the convict is punished for the crime of which he was convicted, and not for violating the terms of his parole.* The suspension of a sentence can never be demanded as a matter of legal right. It is granted at the mere will of the court. When granted, it is not held as a vested right, but as a matter of favor or grace. The statute confers upon courts a discretionary power designed to aid in the reformation and reclamation of convicted persons. By impressing upon the convicted person that he is enjoying a contingent favor, which may be withdrawn or revoked at any time, it is sought to induce or coerce him to amend his ways. The whole force and virtue of the expedient lies in the reserved power of the court to re-

voke the favor and inflict the penalty. *And if this is hedged about with limitations which substantially destroy it, the whole scheme is defeated.*

* * * * *

In the case before us it is not claimed that the court abused its discretion or acted capriciously or arbitrarily by making the order complained of without sufficient grounds, nor that on the merits the defendant has suffered any substantial injustice. In view of the facts proved, which were not even denied by the appellant, that claim could not be successfully made. The complaint is merely that the court committed error in its procedure.

In exercising the powers conferred by the statute in question from the nature of the subject, courts must necessarily have a large discretion not only in respect of the grounds upon which they act, but in the method or procedure by which they ascertain facts and arrive at conclusions. They are not dealing with specific legal rights and are not bound by the standards of legal procedure which usually control judicial proceedings. This is comprehended within the very generally approved rule that an order suspending sentence may be revoked without granting the defendant a trial upon the facts. It logically follows that courts may ascertain facts upon which to act in any manner they see fit, and act upon them, provided only that their proceedings and conduct on the whole

> are not capricious or arbitrary or a manifest abuse of discretion. (Italics ours.)

The respondent might well say, as did the Court in *Miller* v. *Aderhold*, 288 U. S. 206, 210: "The decisions on the point are in conflict. The greater number support the view of petitioner; but we are of opinion that the weight of reason is the other way."

The provision of Section 725, Title 18, U. S. C., in question may be construed as directory and not mandatory and failure to personally take the probationer before the court did not make invalid his commitment to the penitentiary.

"Thereupon such probationer shall forthwith be taken before the court."[2]

Is it not as consistent to argue that this language means merely that the probationer's case must be taken up and considered by the court as it is to read into the statute the language which petitioner seems to attempt to do, namely, that he must be given the right to be heard or to speak himself or by counsel before the court? Can he not be there by virtue of proper proceedings brought to revoke his probation, or does he have to be there personally? If he has to be there personally, what other right can he demand? Is he entitled to postpone

[2] Respondent makes no contention that the amendment of 1933 had the effect to eliminate these words from the statute. The official copy indicates that the first sentence only of the second paragraph of Section 2 was to be replaced, thus leaving the remaining sentences of paragraph 2 of Section 2 as they were formerly.

the hearing? Must bail be furnished during such postponement? (*Pritchett* v. *United States*, 67 F. (2d) 244 (C. C. A. 4th.) Is he entitled to summon witnesses in his defense? May he claim a trial by jury?

Nothing appears in the record to explain why the petitioner or his counsel did not request an opportunity to deny the facts alleged by the probation officer during the eight days intervening between revocation of probation and petitioner's commitment to the penitentiary. If he had formally requested and obtained a hearing, would the court be obliged to listen to him if in its discretion it felt this to be unnecessary?

It is admitted in the petitioner's brief that he had counsel at the time he was held in jail. Could not some written or verbal statement have been filed during that period if there was anything about which he wished to inform the court?

The trial judge upon ordering a revocation of probation need not act, according to the *Burns* case, *supra* (287 U. S. 223), as though the case was "one of formal procedure, either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion."

In the case of *Dillingham* v. *United States*, decided March 7, 1935, by the Circuit Court of Appeals for the Fifth Circuit, Judge Hutcheson,

in affirming the judgment of revocation of probation, stated:

> It is claimed, too, that the revocation followed a hearing inadequate as to procedure and proof. * * *
>
> It is not necessary that all of the conditions of probation be set out in the sentence, nor are formal hearings and formal procedure necessary to a revocation of probation. It is sufficient that it be made sufficiently to appear that the probationer has not conducted himself in accordance with his duty as a probationer. *Burns* v. *United States*, 287 U. S. 216. But if formal charges and formal proceedings were necessary, they were sufficiently had here, for he was brought before the judge on a complaint filed by the probation officer.

There is probably no State in which probation has been more fully developed and under more scientific auspices than in the Commonwealth of Massachusetts. It has been repeatedly pointed out that while there are several times as many persons on probation in Massachusetts as there are serving terms in prison, the crime rates in that State compare favorably with other States in the Union. See—

1. Report of Commissioner of Correction for the State of Massachusetts, 1933.

2. National Committee on Law Observance and Enforcement (Wickersham Committee) Vol. 9.

3. Proceedings, Attorney General's Crime Conference, Washington, D. C., December 1934. (Does Conviction Mean Punishment, by Joseph P. Murphy.)

4. Probation and Criminal Justice, a symposium edited by Sheldon Glueck.

5. Hearing before a Subcommittee of the Committee on the Judiciary of the United States Senate on S. 1042 and S. 1729, 68th Cong., 1st Sess., Feb. 21, 1924. "Probation System in United States Courts," p. 24.

That the wise use of probation is consistent with public safety is also reflected in our reports of arrests, convictions, and crimes known to the police. See—

1. Prisoners in State and Federal Prisons and Reformatories, 1931–32, U. S. Department of Commerce, Bureau of the Census, pp. 4, 5, 6.

2. Uniform Crime Reports issued by Federal Bureau of Investigation, Fourth Quarterly Bulletin, 1934, p. 10.

The State of Massachusetts recently celebrated the fiftieth anniversary of the birth of probation and the wise decisions of the Supreme Court of Massachusetts have played a considerable part in the development of a sound protective system. Two cases decided by the Massachusetts Supreme Court seem to be directly in point on the question as to the construction of the phrase under consideration in this case.

In *Commonwealth* v. *McGovern*, 183 Mass. 238, 240, the statute *required* that a person released on probation shall be furnished by the probation officer with a written statement of the terms and conditions of his release. Upon later revocation of probation the defendant pleaded in bar that he could not be sentenced on the complaint. The judge overruled the plea and in dismissing the defendant's exceptions, Judge Braley used the following language:

> But while the course of the probation officer in the case at bar in not furnishing a written statement to the defendant, and in surrendering him without apparently making an independent investigation to determine whether the information received was true, or furnished a sufficient foundation to justify such action on his part, cannot be commended, *and was not in accordance with the requirement or purpose of the statute,* it does not follow that the defendant's exceptions are well taken. (Italics ours.)

In a later case, *Finer* v. *Commonwealth*, 250 Mass. 493, 497, Mr. Chief Justice Rugg, in dismissing the writ of error, used the following language:

> *Failure to conform to the statute* with respect to stating the period of probation *does not affect the substantial rights of the plaintiff in error* * * *. He is not entitled to be discharged from custody. It does not affect the validity of his sentence or his commitment in execution thereof.

> *His original sentence was valid. If he was dissatisfied with it, he had opportunity for appeal before the suspension of his sentence.* After accepting the advantage extended to him by the law solely for his benefit, he could no longer ask for revision of it or complain of its terms. (Italics ours.)

See also the Hearing before a Subcommittee of the Committee on the Judiciary of the United States Senate, 68th Congress, 1st Sess. on S. 1042 and S. 1729, February 21, 1924, in which it is stated on page 26:

> The Bill is modeled on the best provisions for adult probation in force in the States of New York, Massachusetts, and other States having successful probation work.

In *United States* v. *Lecato*, 29 F. (2d) 694, 695 (C. C. A. 2d), the court said:

> When Congress passed the Probation Law it must be understood to have intended the system so established to be construed in the same sense as it had been in the states from which it was borrowed.

It may have been better if the Government could show in the instant case that the trial judge had insisted that the defendant be brought before him personally, even though he considered it a formality. If the language of the statute is construed to mean that a hearing must be granted and that the requirement for a hearing could not be satisfied except by the personal appearance of the peti-

tioner, then it could still further be found that the court's failure to do this was not fatal, did not affect the substantial rights of the petitioner and can be taken into consideration only as evidence bearing upon the question of judicial discretion. The record discloses the fact that information was brought before the court sufficient to justify the judge in the exercise of a reasonable discretion in revoking the petitioner's probation.

The revocation of probation is the putting into effect of the punishment meted out for the original offense and not for the acts which constitute the violation of probation. See *Jianole* v. *United States*, 58 F. (2d) 115 (C. C. A. 8th), where a refusal to grant continuance in proceedings to vacate probation until termination of another criminal prosecution involving same grounds was held not erroneous.

The weight of authority is to the effect that the whole purpose of probation, with its possibility of prompt revocation, is to keep the probationer alive to the importance of comporting himself with rectitude. In fact, a higher degree of good conduct may well be exacted from him by reason of the reprieve which has been given to him in the way of a suspended sentence. No matter how trivial the violation in comparison with the original crime, the question for the committing judge to determine is whether the circumstances are such that the original punishment should be imposed and not the

degree of guilt or the seriousness of the violation. This must be so in order to justify the repeated statements about the discretionary powers of the court and the need for informality.

The Probation Act, it is submitted, should be construed in a way to facilitate the protection of the public as well as the reformation of the prisoner. If each probationer, instead of being duly impressed with the certainty that the suspended sentence, like the Sword of Damocles, will fall on him in the event of misbehavior, is led to believe that the Sword of Damocles is, after all, made of rubber, and that perhaps the judge did not mean it when he said, "four and one-half years in prison in the event that you do not reform", it must appear that the effectiveness of the probation expedient, as an instrument of public protection, will be seriously impaired, if not destroyed.

In the instant case no attempt was made to increase the length of sentence. The defendant is no worse off than on his day in court, when he waived his right to appeal and accepted probation. See *United States* v. *Lecato*, 29 F. (2d) 694 (C. C. A. 2d). Whatever has been done has been to his advantage. He has had another chance, which he was unable, or unwilling, to accept. The success of the probation law depends largely upon the certainty of punishment to follow violation.

It seems evident, then, that if probation is not to lose that flexibility of administration which is essential to the proper protection of the public,

that this section of the Act cannot be too literally construed and must be interpreted in such a manner as to reserve to the court the free hand urged for it by so many of the courts which have passed upon the probation law.

IV

THE PETITIONER'S REMEDY WAS BY APPEAL AND NOT BY HABEAS CORPUS

In *Glasgow* v. *Moyer*, 225 U. S. 420, 428, 429, this Court said:

> The writ of *habeas corpus* cannot be made to perform the office of a writ of error. * * * * * * The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of *habeas corpus* cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.

This principle has been so often stated by this Court as now to be beyond controversy. See *Knewel* v. *Egan*, 268 U. S. 442, 446–447; *McNally* v. *Hill*, 293 U. S. 131, 138; *Jurney* v. *MacCracken*, 294 U. S. 125, 152. The rule applies even though the time within which a review by appeal might have been obtained has expired. *Goto* v. *Lane*, 265 U. S. 393, 402.

On *habeas corpus* the inquiry is simply whether the court whose order or judgment is challenged had jurisdiction. *Knewel* v. *Egan, supra*, p. 445.

That the District Court had jurisdiction of the offense of which the petitioner was indicted and of

his person cannot be questioned. There can, therefore, be no doubt that it had jurisdiction to pronounce the sentence which it imposed on October 10, 1932, and to suspend the execution of that sentence by placing the petitioner on probation. That, as the court below said, the District Court "had continuing jurisdiction after that date of both the case and of the person of appellant [petitioner] in respect to his probation", is equally clear. Section 1 of the Probation Act provides that "The court may revoke or modify any condition of probation, or may change the period of probation", the only limitation being that the period of probation, together with any extension thereof, shall not exceed five years. And Section 2 provides that "At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest." Pursuant to these provisions a warrant was issued for the petitioner's arrest, and at the time the order revoking probation was entered the petitioner was in the custody of the United States Marshal under this warrant. To prevail, it is evident that the petitioner must establish that the jurisdiction otherwise possessed by the District Court became divested because the court did not follow the procedure of bringing the petitioner before him before he revoked his probation. It is not disputed that the District Judge acted upon evidence, and nowhere in the record is

this evidence controverted. Although the order of the District Court remained within the breast of that court during the term at which it was entered, the petitioner made no application to the District Court by motion for rehearing or otherwise to have its order set aside for the purpose of obtaining a hearing, and he allowed the three months' period within which to take an appeal to go by without resorting to that method of review. Such factors may be considered, and even given controlling weight, in determining the propriety of a discharge on habeas corpus. *Salinger* v. *Loisel*, 265 U. S. 224, 231.

That the failure to bring the petitioner before the court before revoking his probation was not jurisdictional, but was a mere irregularity or error of procedure which went only to the question of an abuse of discretion in revoking probation, and not to the question of jurisdiction, is, we think, indicated by the language employed by this Court in the *Burns* case. In that case, which involved the sufficiency of a hearing upon the question whether probation should be revoked, this Court said (pp. 222-223):

> The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of

judicial discretion. That exercise implies conscientious judgment, not arbitrary action. *The Styria,* 186 U. S. 1, 9. It takes account of the law and the particular circumstances of the case and "is directed by the reason and conscience of the judge to a just result." *Langnes* v. *Green,* 282 U. S. 531, 541. While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.

The order revoking probation in the *Burns* case was carried to the Circuit Court of Appeals on an appeal, and if that remedy had been resorted to in the instant case, instead of *habeas corpus,* the petitioner would have been in a position to contend that revocation of his probation without a hearing was an arbitrary and capricious act, which could have been remedied by the appellate court, or by this Court on certiorari, by remanding the case with directions that he be granted a hearing. But the petitioner chose not to resort to an appeal, and has, instead, invoked relief through *habeas corpus,* as a consequence of which, as the court below pertinently said, the question presented is not whether there was an abuse of discretion by the District Court, but "whether that court had jurisdiction to make the order of August 5th" revoking probation. As we think that the failure to bring the petitioner before the court was a mere irregularity of procedure, and that it did not render the order of the District Court a nullity, we submit that the peti-

tioner has mistaken his remedy and that he should have resorted to the remedy of an appeal from the order to the Circuit Court of Appeals.

While to permit an appeal from the decision of the committing judge revoking probation might interfere with the summary process so necessary in probation matters, it should be pointed out that not only was this the method employed in the *Burns* case, *supra*, to review an order revoking probation, but also by the Government in *United States* v. *Murray*, *supra*, to review an order granting probation. In *United States* v. *Mulligan*, 48 F. (2d) 93, 94 (C. C. A. 2d), which involved the correctness of an order revoking probation, the court said:

> The act itself has no express restrictions on the power to revoke the probation or to modify the terms, conditions, or time thereof. These are matters for the exercise of a sound judicial discretion. The remedy for an abuse of such discretion or for other irregularities or errors in the exercise of the jurisdiction is solely by appeal, not by writ of habeas corpus. *Craig* v. *Hecht*, 263 U. S. 255, 44 S. Ct. 103, 68 L. Ed. 293.

Appeal was also the remedy resorted to in *Furrow* v. *United States*, 46 F. (2d) 647 (C. C. A. 4th); *Pritchett* v. *United States*, 67 F. (2d) 244 (C. C. A. 4th), and *Dillingham* v. *United States* (C. C. A. 5th), decided March 7, 1935, involving orders revoking probation.

See also *Campbell* v. *Aderhold*, 36 F. (2d) 366, 367 (N. D. Ga.), where the court said:

> The discretion touching the revocation is not vested in the habeas corpus court, but in the trial court. How impractical it would be for this Court to review the merits of the conduct of all the persons in the Atlanta Penitentiary whose probations may have been revoked? The task is declined.

Under no circumstances, we submit, may the petitioner be completely discharged from the sentence which he is now serving. Section 761 R. S. (U. S. C., Title 28, Sec. 461) provides, in connection with *habeas corpus*, that it shall be the duty of the judge granting the writ "to dispose of the party as law and justice require." The petitioner's sentence was unquestionably valid, and if it should be held that he was entitled to a hearing and that the question was properly raised on *habeas corpus*, it is obvious, the probation period not having yet expired, that the most that the petitioner is entitled to is to be carried before the District Judge and accorded a hearing. Cf. *Medley, Petitioner*, 134 U. S. 160; *Tod* v. *Waldman*, 266 U. S. 113. The District Judge would, of course, have no power to change his sentence in the event he revoked the probation, as the term of court at which the sentence was imposed has long since expired. (Judicial Code, Sec. 108 as amended; U. S. C., Title 28, Sec. 189; *United States* v. *Benz*, 282 U. S. 304.)

CONCLUSION

It is respectfully submitted that the trial court had no jurisdiction on habeas corpus to allow the writ, nor was it necessary that petitioner be brought personally before the Texas court before his probation could be revoked.

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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MAY 1935.

APPENDIX A

THE PROBATION ACT

The Act of Congress establishing the United States Probation System was signed by President Coolidge on March 4, 1925 (c. 521, 43 Stat. 1259). On June 6, 1930, President Hoover signed an Act amending the original by changing the reading of Sections 3 and 4, and adding Sec. 4a (c. 406, 46 Stat. 503), and on June 16, 1933 (c. 97, 48 Stat. 256), Section 2 was amended.

As amended the Act reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the Court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify

any condition of probation, or may change the period of probation: *Provided*, That the period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible. (U. S. C., Title 18, Sec. 724.)

SEC. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest, which warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued. Thereupon such probationer shall forthwith be taken before the

court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed. (U. S. C. Sup. VII, Title 18, Sec. 725.)

SEC. 3. The judge or judges of any United States court or courts having original jurisdiction of criminal actions, except in the District of Columbia, may appoint one or more suitable persons to serve as probation officers within the jurisdiction and under the direction of the judge or judges making such appointments or of their successors. All such probation officers shall serve without compensation except that in case it shall appear to any such judge or judges that the needs of the service require that there should be salaried probation officers, such judge or judges may appoint such officers. The Attorney General shall fix the salaries to be paid probation officers and shall provide for the necessary expenses of probation officers, including clerical service, and expenses for traveling when approved by the court. Such judge or judges may in their discretion remove any probation officer serving in their respective courts. The appointment of a probation officer shall be in writing and shall be entered on the records of the court or courts of the judge or judges making such appointment, and a copy of the order of appointment shall be delivered to the officer so appointed and a copy sent to the Attorney General. Whenever such judge or judges

shall have appointed more than one probation officer he or they may designate one of such officers chief probation officer. Such chief probation officer shall direct the work of all probation officers serving in the court or courts of such judge or judges. (U. S. C. Sup. VII, Title 18, Sec. 726.)

SEC. 4. It shall be the duty of a probation officer to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision and shall report thereon to the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Attorney General as he may at any time require; and shall perform such other duties as the court may direct. Such officer shall perform such duties with respect to persons on parole as the Attorney General shall request. A probation officer shall have the power of arrest that is now exercised by a deputy marshal. (U. S. C. Sup. VII, Title 18, Sec. 727.)

SEC. 4 (a) The Attorney General, or his authorized agent, shall investigate the work of the probation officers and make recommendations concerning the same to the respective judges and shall have access to the records of all probation officers. He shall collect for publication statistical and other information concerning the work of the probation officers. He shall prescribe record forms and statistics to be kept by the probation officers and shall formulate general rules for the proper conduct of the probation work. He shall endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the probation laws in all United States courts. He shall incorporate in his annual report a statement concerning the operation of the probation system in such courts. (U. S. C. Sup. VII, Title 18, Sec. 728.)

APPENDIX B

Probation Form 7

Conditions of Probation

DISTRICT COURT OF THE UNITED STATES

------ District of ------

Docket No.

To----------

(Address)----------

In accordance with authority conferred by the United States Probation Law, you have been probationed on this date, , for a period of by the Hon. United States District Judge, sitting in and for this District Court at

It is the order of the Court that you shall comply with the following general and special conditions of probation. The general conditions are as follows: (a) Refrain from the violation of any State and Federal penal laws. (b) Live a clean, honest, and temperate life. (c) Keep good company and good hours. (d) Keep away from all undesirable places. (e) Work regularly. When out of work, notify your Probation Officer at once. (f) Do not leave or remain away from the city or town where you reside without permission of the Probation Officer. Notify your Probation Officer at once if you intend to change your address. (g) Contribute regularly to the support of those for whose support you are legally responsible. (h) Follow the Probation Officer's instructions and advice. The Probation Law gives him authority to instruct and advise you regarding your recreational and

social activities. (i) Report promptly on the dates set forth. If for any unavoidable reason you are unable to do so, communicate with your Probation Officer without delay.

The special conditions ordered by the Court are as follows:

You are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation or change the period of probation. If the Court sees fit, it may discharge you from probation at any time from further supervision, or it may extend your period of probation. You shall be subject to arrest, for cause, upon order of the Court, or without order, for cause, by the Probation Officer. At any time within the period of your probation, or within the maximum period for which you might originally have been sentenced for the offense for which you were convicted, the Court may, if it sees fit, for cause, impose the sentence which it might have imposed in the first instance.

The Court has placed you on probation, believing that if you sincerely endeavor to obey and live up to the conditions of your probation, your attitude and conduct will improve both to the benefit of the United States and to yourself.

You will report as follows:

(Signed) _____

Probationer.

_____

Probation Officer.

U. S. GOVERNMENT PRINTING OFFICE: 1938

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SUPREME COURT OF THE UNITED STATES.

No. 773.—October Term, 1934.

Jack Escoe, Petitioner,
vs.
Fred G. Zerbst, Warden of the United States Penitentiary at Leavenworth, Kansas, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 20, 1935.]

Mr. Justice Cardozo delivered the opinion of the Court.

Petitioner was convicted of a crime in the United States District Court for the Eastern District of Texas after indictment and a plea of guilty. He was sentenced, October 10, 1932, to imprisonment for four and a half years in the Penitentiary at Leavenworth, Kansas. On the same day the sentence was suspended for five years upon conditions of probation, and the defendant (the petitioner in this court) was placed in charge of the District Probation Officer for that length of time. One of the conditions was that the probationer would refrain from the violation of any state or federal penal laws. Another was that he would live "a clean, honest and temperate life."

In July, 1933, information was conveyed to the District Probation Officer that petitioner had broken these conditions. In a letter written by his father he was charged with drunkenness and the forgery of two checks. The officer made report of this information to the District Judge and requested a revocation of the order for suspension of sentence. On July 29, 1933, the District Judge issued a mandate for a warrant of arrest. On August 5, he signed an order that the suspension be revoked and that the defendant be committed to prison to serve the stated term. Upon arrest under the warrant the defendant was not brought by his custodian before any court or judge. He was transported at once to the penitentiary at Leavenworth, Kansas, and there imprisoned. Later, in December, 1933, he filed a petition for a writ of *habeas corpus* in the United States District Court for the District of Kansas, contending that his imprisonment was unlawful for the reason that probation had been ended without the opportunity for a hearing

made necessary by statute. The District Judge dismissed the application for the writ, and the Circuit Court of Appeals for the Tenth Circuit affirmed his order. 74 F. (2d) 924. A writ of certiorari issued from this court. 294 U. S.

Upon the suspension of sentence in October, 1932, the applicable statute made provision as follows:

"At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." Act of March 4, 1925, c. 521, § 2; 43 Stat. 1260; 18 U. S. C. § 725.

An amendment of the statute in June, 1933 (Act of June 16, 1933, c. 97; 48 Stat. 256; 18 U. S. C. Supp. § 725) permits the execution of the warrant by a United States marshal as well as by a probation officer, but does not change the procedure otherwise. Under the statute as amended as well as in its original form, the probationer "shall forthwith be taken before the court." This mandate was disobeyed. The probationer, instead of being brought before the court which had imposed the sentence, was taken to a prison beyond the territorial limits of that court and kept there in confinement without the opportunity for a hearing. For this denial of a legal privilege the commitment may not stand.

In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose. *Burns* v. *United States*, 287 U. S. 216. But the power of the lawmakers to dispense with notice or a hearing as part of the procedure of probation does not mean that a like dispensing power, in opposition to the will of Congress, has been confided to the courts. The privilege is no less real because its source is in the statute rather than in the Fifth Amendment. If the statement of the Congress that the probationer shall be brought before the court is command and not advice, it defines and conditions power.

French v. *Edwards*, 13 Wall. 506, 511. The revocation is invalid unless the command has been obeyed.

We find in this statute more than directory words of caution, leaving power unaffected. This is so if we consider the words alone, putting aside for the moment the ends and aims to be achieved. The defendant "shall" be dealt with in a stated way; it is the language of command, a term significant, though not controlling. *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, 534. Doubt, however, is dispelled when we pass from the words alone to a view of ends and aims. Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation. The charge against him may have been inspired by rumor or mistake or even downright malice. He shall have a chance to say his say before the word of his pursuers is received to his undoing. This does not mean that he may insist upon a trial in any strict or formal sense. *Burns* v. *United States*, *supra*, at pp. 222, 223. It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. *Burns* v. *United States*, *supra*. That much is necessary, or so the Congress must have thought, to protect the individual against malice or oppression. Almost equally it is necessary, if we read aright the thought of Congress, for the good of the probation system with all its hopes of social betterment.

If these are the ends to be promoted by bringing the probationer into the presence of his judge, the Act is seen at once to be mandatory in meaning as well as mandatory in form. Statutes are not directory when to put them in that category would result in serious impairment of the public or the private interests that they were intended to protect. *French* v. *Edwards*, *supra*; *Lyon* v. *Alley*, 130 U. S. 177, 185; *Erhardt* v. *Schroeder*, 155 U. S. 124, 128, 130. Such is the situation here. When a hearing is allowed but there is error in conducting it or in limiting its scope, the remedy is by appeal. When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to *habeas corpus* to put an end to the restraint. It is beside the point to argue, as the government does, that in this case a hearing, if given, is likely to be futile because the judge has made it plain how his discretion will be

exercised in that already he has canceled the suspension on the strength of an *ex parte* showing. The *non sequitur* is obvious. The judge is without the light whereby his discretion must be guided until a hearing, however summary, has been given the supposed offender. Cf. *Snyder* v. *Massachusetts*, 291 U. S. 97, 116. Judgment ceases to be judicial if there is condemnation in advance of trial.

We hold that the attempted revocation is invalid for defect of power, and that, the suspension still continuing, the petitioner is entitled to be discharged from his confinement.

The discharge is without prejudice to his arrest and commitment as a result of subsequent proceedings conforming to the statute.

The judgment is reversed and the cause remanded with instructions that the writ must be sustained and the prisoner discharged.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.